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No. 889

In the

Supreme Court of the United States

OCTOBER TERM, 1956

KENNETH TALLEY,

Petitioner,

v.

SEARS, ROEBUCK & COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Kenneth Talley, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on December 14, 1956 (Petition for Rehearing in the said cause having been denied on January 10, 1957).

I.

REPORT OF THE OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix A hereto, infra, page 41, is reported in *239 Federal 2d 82*.

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 14, 1956. (Appendix B, infra, page 51.) A timely petition for rehearing filed on December 31, 1956, was denied on January 10, 1957. (Appendix B, infra, page 51.) This jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1), and Rule 19(b) of this Court.

III.

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit has decided an important question of state law in a way conflicting with applicable state court decisions and, therefore, conflicting with decisions of this Court?

2. Whether the United States Court of Appeals for the Fifth Circuit, by applying to the facts of this case a rule of law applied by the Texas courts in cases involving crucial facts not present in this case, has so extended that rule as to emasculate the Texas policy (as announced by state

statute and State court decisions) in regard to employers who are eligible to subscribe to a workmen's compensation plan but who are non-subscribers and has, therefore, made such an untenable decision of an important question of state law as to call for the exercise of this Court's supervisory jurisdiction over lower federal courts?

IV.

STATUTE INVOLVED

1. The statutory provision involved in this case is the Rules of Decision Act, 28 U. S. C. Section 1652, which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

V.

STATEMENT

Petitioner, who has a wife and two children (R.* 79), is an ex-marine, discharged because of combat fatigue. (R. 57.) After his discharge from the Marine Corps, Petitioner, in 1947, began working for Respondent as a truck driver. (R. 58, 160.) He was some months over 27 years of age on November 21, 1953, the crucial date involved in this suit. (R. 84, 159.)

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*Transcript of Record before the United States Circuit Court below.

Respondent maintains a retail delivery service — delivering customers' purchases to addresses in Dallas and to addresses within 40 miles of Dallas. (R. 25.) Respondent has its delivery area divided into 17 routes. (R. 25.) Seven of these are rural routes, serving the delivery area outside Dallas. (R. 45, 195.) One driver and one helper are assigned to each route. (R. 26.) Respondent has no extra employees available for such deliveries as only 34 men are employed for such service — two for each of 17 delivery routes. (R. 134.)

Petitioner was first assigned a city route and after his seniority built up, was given a rural route. (R. 58.) On November 21, 1953, Petitioner's route covered an area north of Dallas to McKinney, Texas. (R. 59.)

When Petitioner reported for work that morning he followed his usual workday routine. (R. 59.) He picked up his truck keys and drove his truck to the loading dock, went to the Retail Delivery office and got the tickets (sales slips, R. 26) of purchases to be delivered that day and with his helper loaded the merchandise which was in his delivery bay, checking each item against his delivery tickets. (R. 25, 29, 59, 93.) Prior to this, Petitioner as usual had no knowledge of the items to be delivered. (R. 54.)

Among other items in Petitioner's loading bay to be delivered that day was a 361 pound deep freeze (R. 42) which was 54 inches long, 29 inches wide and 36 inches deep — on the outside. (R. 69; 71, Petnr's Ex. 9; 202.) The

only information Petitioner had about the delivery of this item, other than knowing it was heavy and bulky, was that it was to be delivered to a named person on Route 4, Dallas, which address is on the rural delivery route Petitioner worked. (R. 59, 61.)

After Petitioner and his helper loaded the truck, he took the delivery tickets (sales slips) back to the Retail Delivery office, as was usual, to check them against the "Driver's Retail Load Sheet" which showed the items Petitioner was charged with for delivery and which had been made up in the Retail Delivery office from the sales slips. (R. 25, 26, 27, 29, 59.) Petitioner would make this check to make sure that he had loaded all the items he was charged with on the load sheet. (R. 27.) The load sheets are made up by either Mr. James Hudler, the Supervisor of Retail Delivery (R. 24) or his assistant, Mr. Holloway. (R. 27.) On the day in question the Supervisor made out the sheet. (R. 30.) Either the Supervisor or his assistant would help Petitioner make his check. (R. 27.) On the day in question the Supervisor checked Petitioner out. (R. 27, 30.)

The load sheet for Petitioner's deliveries on November 21, 1953 (R. 28, Petnr's Ex. 1; 30), the day in question, does not show the deep freeze by terms, nor does it show the specific weight or size. Instead, opposite the name of the person on the load sheet, who according to the sales slip was to get the deep freeze, appears the delivery address (Route 4, Dallas) and the figure "80" in a column

headed "Unit." (R. 28, Petnr's Ex. 1; 30.) The "80" is a figure from a scale of figures used by Respondent to indicate the size of the item, and "80" indicates a big item like a deep freeze. (R. 29, 30.) Everyone familiar with the system used can look at a load sheet and tell the size of the items to be delivered. (R. 30.) In this instance, Petitioner's Supervisor inserted the "80" on making up the load sheet from the sales slips. (R. 30.)

After making the above check, Petitioner and his helper started out to make that day's deliveries. Before noon (R. 97, 129), when Petitioner's truck was still about half full with merchandise to be delivered (R. 129), he came to the place on Route 4, Dallas, where the deep freeze was to be delivered. This place is about a mile or two south of Richardson, Texas (R. 60), and north of Dallas. The nearest neighbor is not closer than a few hundred yards. (R. 128.)

On inquiry at this address, Petitioner was told that the deep freeze was to be put in the garage. (R. 60; 62, Petnr's Ex. 5; 65, Petnr's Ex. 6; 68, Petnr's Ex. 8; 71, Petnr's Ex. 9.) Petitioner was unable to back his truck up to the garage because of an electric wire over the drive (R. 63, 97, 98, 126, 167, 183, 190), and because there was a vehicle in the drive which did not belong to anyone residing or present at the address. (R. 63, 97, 98, 126, 130, 167, 183, 190.)

And because the vehicle blocked the way, Petitioner could not carry the deep freeze up the loose gravel drive

(R. 100, 131, 167, 169, 191), and it was necessary for him to cross the edge of a bumpy patio (R. 64; 65, Petnr's Ex. 6; 130) in order to get the deep freeze to the garage. (R. 66, 72, 98, 102, 126, 184, 191, 193.) Petitioner decided that the patio was too rough and the approach too unsafe to use the dolly he had been issued by Respondent as an aid in deliveries. (R. 92, 93, 100, 105.) Petitioner and his helper then undertook to carry by hand (R. 63, 72, 184) the bulky, 361 pound deep freeze the approximately 25 yards to the garage. (R. 99, 182, 190.) In the process of doing this — carrying the deep freeze across the corner of the patio toward the garage — Petitioner's helper slipped and nearly dropped his end. (R. 73, 103, 104, 125, 127, 131, 184.) This threw all the weight on Petitioner, who was carrying the heavy motor end. (R. 73.) In an attempt (which was successful) to keep the 361 pound freezer from falling to the ground, Petitioner held on and assumed the sudden addition of weight. (R. 73, 103, 184.) As a result, Petitioner's knee was severely injured. (R. 73, 74-75, 103-104, 127, 131, 139, 184, 185.)

After the deep freeze was almost dropped, Ross Stultz, the customer, and his son, James Stultz, who were watching, came to the assistance of Petitioner and his helper and aided them in carrying the deep freeze into the garage. (R. 104, 125, 185, 191.)

Petitioner made the rest of his deliveries that day. The injury was reported to his Supervisor and then to the secretary of the personnel department who gave Petitioner a slip to see a doctor. (R. 46, 74.) He received treat-

ment and when his knee persisted in swelling, a plaster cast was put on it. (R. 75, 140, 141, 172-173.) His knee still did not respond to treatment and it was determined that an operation would have to be performed. This was done and it was found that the knee cartilege had begun to disintegrate and it was removed. (R. 141, 143, 148.) Petitioner spent about a week in the hospital and was unable to return to work for an additional two weeks. (R. 76, 77, 114, 143.)

When Petitioner returned to work he was assigned to the stock room at the same hourly rate of pay as he received before, but he was limited to 40 hours a week work time. Cut off from overtime pay, Petitioner found that he was not making enough to support his wife and children. Because of this and because of slurring remarks made at work about his being another cripple, Petitioner finally quit his job with Respondent. (R. 78-80.)

Because Petitioner was 20% permanently disabled (R. 145, 148, 174, 178) as a result of the injury he received in delivering the bulky, 361 pound deep freeze with only one helper on November 21, 1953, and because Respondent, though eligible under Texas law, was not a subscriber to a workmen's compensation plan (R. 150-151), Petitioner brought this suit in a Texas state court for damages. Petitioner, in his complaint, alleged that Respondent was guilty of negligence which proximately caused Petitioner's injury — in that Respondent failed to furnish sufficient help; in that Respondent directed Petitioner to make the delivery

in question without sufficient help; and in that Respondent failed to supply necessary mechanical contrivance to assist in unloading the deep freeze. (R. 3.)

The suit was then removed on motion of Respondent to the Federal District Court for the Northern District of Texas, there being diversity of citizenship and the necessary amount in controversy. (R. 1, 5-11.)

On trial of this cause in the Federal District Court before a jury, the facts set out above were put in evidence by virtually undisputed testimony and exhibits.

In addition there was testimony in re Respondent's attempt to prove:

(1) That Ordinarily Two Men Are Sufficient to Deliver A Deep Freeze

Mr. Sims, a witness-employee of Respondents, testified that under ordinary circumstances two men are adequate for the delivery of a deep freeze. (R. 197.)

However, Luther Hudler, a double cousin (R. 214) of Respondent's Supervisor of Retail Delivery, testified that he had worked for Respondent for 15 years (R. 217); that he worked as a truck driver on the Retail Sales delivery routes, city and rural; that he had on occasions delivered deep freezes(R. 212); and that even without complications he thought two men were *not* ample to make such deliveries. (R. 216.)

Petitioner testified that with proper equipment he thought two men would be sufficient to load and unload deep freezes (R. 96); but he testified that the equipment

furnished drivers was not adequate. (R. 90-93, 96, 105, 107.)

And Mr. Ross Stultz, the customer, who was called as a witness by Respondent, testified on cross examination that the minute he saw Petitioner and his helper start moving the deep freeze, he could tell it was too heavy for them. (R. 193.)

(2) That Petitioner Would Have Been Given Additional Help Had He Asked For It

Respondent's Supervisor of Retail Delivery, Mr. James Hudler, testified that it was left up to the driver to request help, even though it was known by the Supervisor that a big item of 360 pounds or more was being delivered. (R. 43.)

Petitioner, on cross examination, testified that he had been instructed that when he needed additional help he was to call in and it would be furnished (R. 87, 106); that on the day his knee was injured he did not say anything to anyone about needing additional help (R. 94); that he did not call in for additional help (R. 105); and that he did not even consider calling for extra help on that occasion. (R. 106.)

However, Petitioner also testified that early in his employment with Respondent he had needed additional help and that he did phone in and ask for it; that he had talked to Mr. Holloway, the assistant supervisor of Retail Deliveries, and that Mr. Holloway said he would ask the Supervisor, Mr. James Hudler, and that when Mr. Holloway

returned to the phone he told Petitioner no help was available. (R. 84-87.) Petitioner further testified that on that occasion he *was not* told to return until help was available but on the other hand that he was not specifically instructed to make the delivery without help. (R. 87.)

And Mr. Luther Hudler, the Supervisor's double cousin (R. 214), testified that he had worked for Respondent as a delivery driver and that once when he was to deliver a deep freeze he asked for additional help as he knew the particular address and knew that it would take more than two men to effect the delivery; that he had asked the assistant supervisor, Mr. Holloway, and was refused, was told that the additional help could not be afforded. (R. 212, 213, 215.) This witness testified, however, that on that occasion he was able to make the delivery without injury, even though he was not given the requested help. (R. 215.)

And Petitioner testified that he had heard others refused help and that Mr. Holloway, Respondent's Assistant Supervisor of Retail Deliveries, had told them to punch out and go home and someone else would be gotten to do it. (R. 85.) Petitioner also testified that he knew he would not have kept his job long if he had called in for help every time he tried to move a deep freeze. (R. 123.) Mr. James Hudler, the Supervisor, testified that he had never told anyone this and had never heard his assistant, Mr. Holloway, do so. (R. 46.) The Supervisor, however, did admit that Respondent had on occasions hired independent haulers to deliver large items of "60" or "80" units big (R. 43-44), and that he had the power to hire and fire. (R. 221.)

Respondent's Supervisor of Retail Deliveries further testified that, although about twice a week a city route delivery crew is doubled up and four men sent on the route instead of the ordinary two (R. 43, 45), to the best of his knowledge no more than two men had *ever* been sent out to make deliveries on a rural route (R. 44, 45), even though the load sheet would disclose that an item to be delivered weighed 360 pounds or more. (R. 43.) In his 5 years as supervisor (R. 24) he did not remember such a request ever being made for any of the seven rural routes. (R. 44, 45.)

Also, the Supervisor testified that in fact there were no men available to send out at the time (before noon, R. 129) Petitioner was delivering the deep freeze on November 21, 1953 (R. 133), and that in fact only 34 men were employed for retail delivery service, two men for each of 17 delivery routes served (R. 134), and that had Petitioner called in, it would have been in the afternoon before help would have been available and then only if some of the other drivers had finished their deliveries and had not punched out and gone home. (R. 134.)

(3) That Drivers Were Instructed to Hire Help on the Spot When Needed and That Petitioner Could Have Done This

Respondent's Supervisor of Retail Deliveries, Mr. James Hudler, testified that drivers were instructed to hire help on the spot if it were found that delivery could not be made at an address without additional help. (R. 50-51, 52-53.)

Mr. Sims, a witness-employee of Respondent's, testified that he had been told to hire help on the spot if he ever found it was needed (R. 197, 200), but that he had in fact never hired help and had never been given money to do so if necessary. (R. 200-201.)

The Supervisor further testified, however, that no voucher forms were furnished for the purpose of verification information as to money paid by drivers for help hired on behalf of Respondent and that he could not say whether drivers had ever hired help more than once a year and could recall no specific instances of those occasions. (R. 52-55.)

Petitioner testified that he did not remember ever being told to hire such help on the spot. (R. 109.)

Mrs. Stultz, who lived at the address where the deep freeze was delivered on November 21, 1953, testified that no one lived within a few hundred yards of that address and that in fact there were no laborers in the area (who could have been hired). (R. 128.) She did testify that in addition to herself, her husband and her father-in-law were watching the Petitioner unload the deep freeze. (R. 125.) She further testified that the deep freeze was purchased in her father-in-law's name on behalf of himself and her husband. (R. 124.) Petitioner testified that it was his understanding that customers were not to be asked to go out of their way for deliverymen. (R. 110.)

(4) That Petitioner Could Have Returned the Deep Freeze When He Found Himself in Need of Help and No Help Was Available

Mr. James Hudler, Respondent's Supervisor of Retail Delivery, testified that men on delivery routes, city and rural, had brought back merchandise because they were unable to deliver it and that he did not know if anything was said to them about it. (R. 51.)

And Mr. Sims, Respondent's employee-witness, testified that when he had once been unable to make delivery, he brought the merchandise back, although he had never been instructed to do so, and that he had not been discharged for bringing it back. (R. 197, 198.)

Petitioner testified that he had called in for help on one occasion and the help was refused, but he was not instructed to bring the merchandise back until help was available. (R. 87.) He also testified that he had heard others (who had asked for help) told by Respondent's Assistant Supervisor of Retail Delivery, Mr. Holloway, to punch out and go home and others could be gotten to do it. (R. 85.) Further, Petitioner testified that he could not have kept his job long if he had called for help every time he had had to move a deep freeze. (R. 123.)

Mr. Hudler, the supervisor, testified that he had never told anyone to go home because help was asked for and that he had never heard his assistant, Mr. Holloway, do so.

(R. 46). Mr. Hudler did admit, however, that Respondent had on occasions hired independent haulers to deliver large items of "60" or "80" units big (R. 43-44), and that he had the power to hire and fire. (R. 221.)

History of Past Injuries

Petitioner, on cross examination, testified that he had been injured once before by lifting, that he had pulled a blood vessel in his stomach. He also testified that there had been other occasions when other employees of Respondent's got hurt by lifting. (R. 95.)

Mr. Wesson, a police department employee (R. 166) and a past employee of Respondent's, was called as a witness by Respondent. On cross examination this witness testified that he did not remember Petitioner wearing a cast on the job after his injury as there were several people getting hurt, straining a leader or something like that. (R. 168-169.)

And Luther Hudler, a double cousin of Respondent's Supervisor of Retail Delivery, testified that he had worked the rural route Petitioner was delivering on when injured, and that he, Luther Hudler, had hurt his back while lifting, had been transferred to another department, was cut back to 40 hours work time, found he could not make a living at it and quit. (R. 212-214.)

On close of the evidence, the District Judge charged the jury as to unavoidable accident, negligence, proximate cause, foreseeability, burden of proof and the jury's right to decide who it believed where the testimony conflicted. (R. 222-225.) Further the trial judge charged the jury that under the law [of Texas] Petitioner did not assume the risk of Respondent's negligence, if any—even though Petitioner was aware of the danger which he was undertaking in performing his task. (R. 229-230.)

The jury found for Petitioner and assessed damages at $20,000. (R. 233.)

The Trial Judge overruled Respondent's motion for judgment notwithstanding the verdict but required the Petitioner to agree to a reduction of the verdict (on the ground that the damage awarded was excessive) to $12,000 or suffer the grant of a new trial on Respondent's motion for such. (R. 239.) Petitioner agreed to the reduction and judgment was entered in the amount of $12,000. (R. 240.)

Respondent appealed and the 5th Circuit Court below reversed on the ground that the trial judge had erred in not entering judgment for the Respondent notwithstanding the verdict.

VI.

REASONS FOR GRANTING THE WRIT

1. In reversing the judgment entered on the jury verdict for Petitioner based on the evidence in this case, the court below has decided important questions of state law in a way conflicting with applicable Texas court decisions in:[1]

A. *Loud v. Sears, Roebuck & Co., 262 S. W. 2d 548 (Tex. Civ. App., 1953)* and

B. *Neigut v. McFadden, 257 S. W. 2d 864 (Tex. Civ. App., 1953—writ of error refused, no reversible error)*, cited with approval in *Loud v. Sears, Roebuck & Co.*, supra.

C. (a) *Rodriquez v. Higginbotham-Bailey-Logan Co., 138 Tex. 476, 160 S. W. 2d 234 (1942)* and

(b) *Fowler v. Texas Employers' Ins. Ass'n, 237 S. W. 2d 373, 375 (Tex. Civ. App., 1951—writ refused); Hurley v. Knox, 244 S. W. 2d 557, 559 (Tex. Civ. App., 1951—writ refused—no reversible error); St. John v. Fitzgerald, 281 S. W. 2d 201, 205 (Tex. Civ. App., 1955); Mesquite v. Scyene, 295 S. W. 2d 276, 281 (Tex. Civ. App., 1956—writ of error refused, no reversible error).*

A. In *Loud v. Sears, Roebuck & Co., 262 S. W. 2d 548 (Tex. Civ. App., 1953)*, decided by the Dallas Court of Civil Appeals, a summary judgment entered by the trial judge on motion of the defendant, Sears, was reversed. From the evidence developed at a preliminary hearing it appeared: that Sears' building superintendent had told the plaintiff,

[1]The decision below also conflicts squarely with the principles for decision in this type case announced by the Texas Supreme Court in *Sears, Roebuck & Co. v. Robinson, 154 Tex. 336, 280 S. W. 2d 238 (1955).* See page 34, infra.

an employee of Sears, to report at 4:00 p. m. that afternoon back to the loading dock, where they were standing at the time, to help move a motor; that plaintiff did report there and found waiting a person he did not know; that plaintiff was told by that person to help lift the motor there onto a push truck; that plaintiff protested about the motor being too heavy for two to lift; that plaintiff was told it was not too heavy; that they then lifted it and plaintiff's back was injured. Sears contended that it had not negligently failed to exercise due care in furnishing the plaintiff with sufficient help because it had a standing general order that no one was to lift anything too heavy and that it could not have anticipated that plaintiff would attempt to do so in violation of that order. But the Court of Civil Appeals rejected this argument on the ground that the evidence was such that it was a fact issue for the jury as to whether the specific direction on this occasion to be at the appointed place, in light of the surrounding circumstances, was an order superseding the general order.

In that case Sears also argued that, under the authority of *Western Union Tel. Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977 (1947); Great Atlantic & Pacific Tea Co. v. Evans, 142 Tex. 1, 175 S. W. 2d 249 (1943);* and *Jackson v. Marshall, 243 S. W. 2d 205 (Tex. Civ. App., 1951),* it should be held that as a matter of law no material facts were in issue from which negligence could reasonably be found by a jury. The Texas Court of Civil Appeals rejected the con-

tention. As to the *Western Union v. Coker* case, supra, the Texas Court of Civil Appeals said:

> "We do not believe the holdings in the cited case are applicable to the facts as shown in this record. In the cited case the facts were that Coker ordinarily had an assistant, but his assistant was not present at the moment, and Coker did not try to summon him. Moreover, in Coker's case, his foreman and other employees were in the next room and easily available. No such fact situation is disclosed in the record we are now considering." *262 S. W. 2d 548, 553.*

The court likewise rejected the contention that the *Jackson v. Marshall* case, supra, was controlling. The court said:

> "We do not think it is in point either, Marshall injured his back while lifting a tub of refuse. The facts showed that about six months before, Marshall had injured his back in the same way—by lifting just such a tub of refuse. Certainly in the light of his previous experience, before lifting the second tub of refuse he should have called for assistance. And assistance was easily available to him, for Marshall was working in sight of his employer and in the same building with another employee. No such situation is before us in the instance case." *262 S. W. 2d 548, 553.*

A further distinction as to the *Jackson* case was that in that case the injured employee made the determination of how heavy the load would be; for his duty was to empty refuse into a tub and carry it out for disposal and he was not ordered to fill the tub to any particular level, whereas in the *Loud* case the employee had no control over the weight of the motor.

And as to defendant's reliance on *Great Atlantic & Pacific Tea Co. v. Evans*, supra, as authority that as a matter of law defendant could not reasonably foresee that plaintiff would be injured, the court in the *Loud* case said:

> "In the cited case Evans was injured while lifting a sack of potatoes weighing about 100 pounds. The evidence showed that Evans was a strong young man, who had lifted such sacks of potatoes many times before. The evidence even showed that it was the usual and customary thing for grocery store clerks and employees to do this character of work. Under these circumstances we certainly agree that the employer could not foresee that Evans would be injured. But the facts now before us are quite different. Appellant was a man 54 years old and weighed about 147 pounds. He testified that he had never before been called upon to lift such a motor. The weight of the motor is not given in the record, but the circumstances imply that it was quite heavy. Arthur, the superintendent was present on the dock to see about the motor when he gave his instructions to appellant. He must have known of the general physical characteristics of the motor; otherwise, why would he have indicated by his instructions that he would have assistance available for appellant?" *262 S. W. 2d 548, 554.*

The only facts in the case at bar that are in common with the facts of the *Great Atlantic & Pacific Tea Co. v. Evans* case, supra, are that: in both, the employee injured was a relatively young man and had been doing the same general type work over a relatively long period of time. The similarity ends here, however. For, in the *Evans* case: (1) a small relatively light sack of potatoes was involved; (2) there was testimony showing that it was normal in other stores for such sacks of potatoes to be carried by one

employee without additional help; (3) there was no testimony of past injuries; (4) he had never asked for help before. Evans' injury was a hernia, and there was nothing which could normally have put Evans' employer on notice that injury to Evans should be anticipated.

The evidence introduced at the trial below in the case at bar shows that: Respondent's Supervisor of Retail Delivery, who was Petitioner's superior, knew the approximate size and weight of a deep freeze (R. 43); knew that, on the day in question, Petitioner was assigned the duty of delivering one of these heavy, bulky items (R. 30) and that he knew Petitioner had only one helper to aid him. (R. 134.) This helper had been hired in the same month and had been helping Petitioner only a short while before the injury sued on below. (R. 59, 101, 167-168.) Petitioner was not furnished extra help, however. Petitioner testified that two persons would have been enough under normal circumstances *if adequate equipment were furnished*, but denied that adequate equipment had been furnished. (R. 90-93, 96, 105, 107.) Another ex-employee of Sears testified that even without complications, two men were not sufficient manpower to make safe delivery (with the equipment furnished) of such heavy, bulky items. (R. 216.) There was testimony that help had been requested on other occasions and was not furnished. (R. 84-85, 87, 212, 213, 215.) There was ample testimony to show a history of past injuries to employees in attempting to lift heavy items. (R. 95, 168-169, 212-214.) There was no evidence that only two men, with no better equipment than Petitioner had been given,

were normally assigned by other employers to deliver similar heavy, bulky items. From all of this, a jury could reasonably conclude that two men were *not* normally sufficient with the present equipment furnished and that Sears could have reasonably anticipated that injury would result.[2]

The mere fact that Sears normally directed only two men to deliver such heavy items cannot, by any reasonable process of thought, mean that this conclusively showed as a matter of law, which could not be rebutted, that two men are a safe number of employees to assign to such a task and thereby allow Sears to perpetuate a course of conduct which experience of injuries shows in fact not safe. Certainly no Texas case has so held.

To the contrary, the *Loud* case, supra, made it clear that the *Evans* case, supra, has no application where something more is shown than that the plaintiff, while working under circumstances common to the type business, received injuries. And the evidence in the case at bar shows to a

[2]Perhaps the Court of Appeals below did not fully consider all of the evidence of record in the case at bar, as would appear to be the case from reading the court's statement of the facts in footnote (1) of its opinion. (See Appendix A, page 42, infra). In the next to the last paragraph the court states: "There was no evidence that two men were insufficient." This statement is in contradiction to what the record shows the evidence to be. (R. 216.)

And in the last paragraph the court states: "Indeed, both appellee [Petitioner] and his assistant testified that two men would be sufficient to load and unload a freezer of the type appellee [Petitioner] was handling when injured." This was part of the testimony of Petitioner, but just part of it. In answer to a question as to whether two men are customarily sufficient to load and unload deep freezes, Petitioner said: "If they had proper equipment, yes." (R. 90-93. Also see 96.) And the person who was Petitioner's helper on the date in question said nothing in his testimony which could reasonably be construed to mean what he is credited as testifying to. (See R. 166-170.)

stronger degree than in the *Loud* case that the Respondent should have anticipated that Petitioner would be injured if he were not given more help or better equipment to deliver such a bulky, awkward and heavy item as a deep freeze.[3]

But even though in the *Loud* case, which is weaker in its facts than the case at bar, the Dallas Court of Civil Appeals held the *Evans* case not applicable and held that on the facts, forseeability of the injury was a jury question, the Court of Appeals below has refused to apply the *Loud* holding or to go along with the distinction made in that case and has held that the *Evans* case is applicable and controlling.

B. Contrary to the obvious distinction pointed out in the *Loud* case, supra, in holding the *Western Union Tel. Co. v. Coker* case, supra, not applicable to the facts of that case, and contrary to the *Loud* holding on its facts, which raise weaker inferences than the facts of the case at bar, the Court of Appeals below has refused to apply the *Loud* holding in either respect and has held that the *Western Union* case controls in this case.

As pointed out above in the quotation from *Loud*, the *Western Union* case held that as a matter of law a jury case of negligence had not been made out where sufficient help had been provided (one helper in that case) but was

[3]It is not necessary under Texas court decisions that the particular event which in fact precipitated the injury be foreseen, all that is required is that some similar event could have been foreseen through the exercise of ordinary care. E.g., see *Carey v. Pure Distributing Corp., 133 Tex. 31, 124 S. W. 2d 847, 849 (1939).*

absent at the time the work was undertaken that resulted in injury, since no effort had been made to find the helper who may have been near at hand and subject to call, and since no effort had been made to seek the aid of other employees, readily available in the next room. Such was not the situation in the case at bar.

Respondent's supervisor testified that it was left up to the driver to request help. Petitioner testified that he had been told to ask for help when *he* thought he needed it, and that he had not asked for extra help.[4] That perhaps would without more bring this case squarely within *Western Union* and outside *Loud* and the distinction made in *Loud.* But there *is* more.

In *Neigut v. McFadden, 257 S. W. 2d 864 (Tex. Civ. App., 1953—writ of error refused on the ground there was no reversible error)*, cited with approval in *Loud v. Sears Roebuck & Co.*, supra, it was held that "Facts are not established as a matter of law if there is evidence direct or *circumstantial* negativing their existence." (Emphasis supplied.) *257 S. W. 2d 864, 870.* And in the case at bar there is ample evidence negativing the existence of available help.

Petitioner did call in for help once but was told none was available (R. 84-87). The previous driver on the country route Petitioner was working when injured, testi-

[4]In *Sears, Roebuck & Co. v. Robinson*, note 1, supra, the plaintiff did not think he would slip. Held: this is evidence of assumed risk which is not available as a defense. See also *Rice v. Garrett, 194 S. W. 667, 672 (Tex. Civ. App., 1917)* (plaintiff did not think he would be injured).

fied that he had asked for additional help to deliver a deep freeze on that route and had been told additional help could not be afforded (R. 212). It takes all day usually to make a day's delivery on one of Respondent's rural routes. (R. 32). As much as twice a week double crews are sent out on the city routes, whereas Respondent's Supervisor of Retail Delivery, who had worked in that capacity for about five years (R. 24), testified that to the best of his knowledge not more than two men had *ever* been sent out on a rural route, even though the load sheet would disclose that an item of 361 pounds or more was to be delivered. (R. 43, 44, 45.) And, in fact, the Supervisor testified that only 34 men were employed for delivery service, two men for each of 17 delivery routes. (R. 134.) Further, Petitioner testified that he had heard others (who had asked for help) told by the assistant supervisor to punch out and go home and others could be gotten to do it. (R. 85.)

All of this evidence is certainly more than sufficient to justify a jury in finding that no help was in fact available to Petitioner and that the only purpose such a direction could serve as to rural routes was to put Petitioner to a choice—of calling in and saying that the help he had and which was insufficient as to normal circumstances was still or even more insufficient in the particular circumstances and of asking for additional help[5] he already knew he would not get and of running the risk of discharge if he insisted; or to remain silent and attempt the delivery, run

[5]See note 3, supra.

a greater risk of injury and possibly be barred from recovery because he did not call in.

Thus the Circuit Court below has either refused to consider that circumstantial evidence is entitled to weight as evidence of the non-availability of help, in conflict with the *Neigut* and *Loud* cases, supra, or has applied the *Western Union* case, supra, in conflict with the holding and distinction laid down in the *Loud* case.

Also the Court of Appeals below apparently relies on the cases cited in footnote (2) of its opinion as also requiring the result reached. (See Appendix A, p. 44, infra.) In all those cases, however, other employees were in fact at hand and had either helped the plaintiff on request before or there was no showing that they would not have and the work which resulted in injury was undertaken without a request for help. In the last two cases cited, *Jackson v. Marshall, 243 S. W. 2d 204 (Tex. Civ. App., 1951)*, and *Shumake v. Great Atlantic and Pacific Tea Co., 255 S. W. 2d 949 (Tex. Civ. App., 1953)*, there was an additional factor—the employees had discretion as to how heavy their load would be. Of course, as in the *Loud* case, there was no such discretion involved in the case at bar.

The *Jackson* case, supra, was rejected in *Loud* as applicable authority in a case like the one at bar. And, since all of the cases cited are factually the same as either the *Western Union* case, supra, or the *Jackson* case, supra, or both, the *Loud* holding and the distinction made in *Loud* likewise applies.

In its opinion the Court of Appeals below, while inferring that if not distinguishable *Loud* would be controlling, excused its disregard of the *Loud* case by saying in part that "In it [*Loud*] the court, in no manner undertaking to depart from or limit the *Western Union* decision, * * * reversed the judgment * * *." (Appendix A, p. 49, infra.)

The court in *Loud* did expressly hold that the *Western Union* case was not in point for the reasons given. In one sense a case is not limited if it is held to be obviously inapplicable—but if considered not limited because inapplicable, then likewise it must follow that *Western Union* is inapplicable to the case at bar, which is a stronger case than *Loud* in that respect. In another sense, all cases distinguished are thereby limited—considered this way the court below is again plainly wrong. In either sense, conflict exists between the decision below and the *Loud* case.

Or, the Court below may be holding that *Loud* did not limit *Western Union* because although *Western Union* was distinguished as to one of the grounds for reversal, in *Loud*, there was another ground and therefore what was said about *Western Union* was dictum. But the court in the *Loud* case squarely puts the reversal on both grounds, and for a federal court to regard either ground as dictum, especially as to answers to contentions made, would violate the holding of this Court in *Six Companies v. Joint Highway District No. 13, 311 U. S. 180, 187, 85 L. Ed. 114, 117 (1940)*. It is true that on rehearing in the *Loud* case[6] the *Western Union* case was not again referred to. But just

[6] *262 S. W. 2d 548, 555.*

because Sears did not choose to press the point again in that case on rehearing could not mean that what had been said before was thereby wiped out. And even if the other ground for reversal in *Loud*—for a fuller development of the facts—makes what was alternatively said inapplicable, the Court of Appeals below has taken an inconsistent position, for also one ground for reversal in *Western Union* itself was so that the facts could be more fully developed.

C. Also the language the court below uses, in excusing its refusal to follow the *Loud* case, indicates that the court is letting something turn on the fact that *Loud* was a case on appeal from a *summary judgment* entered on the motion of Sears, whereas the case at bar involves a motion by Sears for *judgment notwithstanding the verdict.* The court's language indicates that it is not the same test applied in each instance to test the different motions. That assumption, however, brings the court's opinion and holding into conflict with still another group of Texas cases.

For it is clear from the Texas cases that there is no difference between the test applied to pass on a motion for summary judgment (at least in order to grant the motion) and the motions for directed verdict and judgment notwithstanding the verdict.

In the *Loud* case itself it was said that in testing a grant of summary judgment:

> "It is well established that a motion for summary judgment should be refused if the record, viewed in a light most favorable to the resisting party, discloses a material issue of fact." *262 S. W. 2d 548, 550.*

And on rehearing the court in the *Loud* case spelled it out more fully:

> "There are certain well-established principles which must guide us in passing on this or any other summary judgment. The burden is upon the movant to prove that there is no genuine issue of any material fact. All doubts as to the existence of a genuine *issue as to a material fact* must be resolved against the party moving for a summary judgment. The court accepts as true all evidence of the party opposing the motion which tends to support such party's contention, and gives him the benefit of every reasonable inference which properly can be drawn in favor of his position. On the other hand, a motion will not be granted if sustaining it involves the credibility of affiants, or deponents, or the weight of the showings, or a mere ground of inference." (Emphasis supplied.) *262 S. W. 2d 548, 551.*[7]

And in *Fowler v. Texas Employers' Ins. Ass'n, 237 S. W. 2d 373, 375 (Tex. Civ. App., 1951—writ refused)*, a case on appeal from a summary judgment, the court ruled that:

> "In determining whether there is a fact issue *the court should apply the same test applicable to a motion for an instructed verdict*, treating as true all evidence favorable to the party against whom a summary judgment is sought and indulging in his favor all inferences that can reasonably be drawn from the evidence and resolve all doubts against the movant." (Emphasis supplied.) *281 S. W. 2d 201, 205.*[8]

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[7]And though facts are uncontroverted, if reasonable minds could draw different inferences from them, inferences are themselves controverted and treated as controverted facts. *Bliss v. City of Ft. Worth, 288 S. W. 2d 558 (Tex. Civ. App., 1956—ref., n. r. e.).*

[8]This case was decided by the Ft. Worth Court of Civil Appeals. See also, *Hurley v. Knox, 244 S. W. 2d 557 (Tex. Civ. App., 1951—writ refused, no reversible error)*, decided by the same court. Two other Texas Courts of Civil Appeals have held the same—Eastland: *St. John v. Fitzgerald, 281 S. W. 2d 201, 205 (Tex. Civ. App., 1955);* Dallas: *Mesquite v. Scyene, 295 S. W. 2d 276, 281 (Tex. Civ. App., 1956—writ of error refused, no reversible error).*

And finally, in *Rodriguez v. Higginbotham-Bailey-Logan Co., 138 Tex. 476, 160 S. W. 2d 234 (1942)*, the Texas Supreme Court, in passing on the grant of a motion notwithstanding the verdict, ruled that:

> "[a] *judgment non obstante veredicto can be rendered only when the facts are such that an instructed verdict would have been proper.* [Holding that the evidence was in dispute the court concluded that therefore, there was] no authority to render judgment non obstante veredicto. When the court renders judgment non obstante veredicto it is equivalent to a finding that there was no evidence to raise an issue for the jury * * *" (Emphasis supplied.) *160 S. W. 2d 234, 235.*

Thus the Texas courts hold that the determination to be made at each stage of the proceeding is the same—*whether there is evidence to raise an issue for the jury.* For the court in the *Fowler* case, supra, said the test to be applied on a motion for summary judgment is the same test applied on a motion for an instructed verdict. And the Texas Supreme Court in the *Rodriguez* case, supra, held that a judgment notwithstanding the verdict is improper unless an instructed verdict would have been proper.

It is inconceivable, therefore, in the face of these holdings that it could be held that the test applied to the grant of a summary judgment *(Loud* case, supra) is different from the test to be applied to a case on a motion for judgment not withstanding the verdict as the court below has held it to be. And no Texas case has been found where such a difference has been held to exist.

The court below apparently bases its assumption (that there is a difference in the test applied) on language quoted

in the *Loud* opinion (on rehearing) from a Texas Supreme Court opinion that:

> "It is hardly necessary to state that the summary judgment practice is to be exercised with great caution, litigants having a right to final trial '*where there is the slightest doubt as to the facts* * * *'." *262 S. W. 2d 548, 555, 556.*

If that language reflects a different test, the difference is not between the test of summary judgment and the test of judgment notwithstanding the verdict, but the difference between the test to be applied *on motion for* summary judgment and the test to be applied to a *grant of* summary judgment. For it is settled in Texas that there is no reversible error if summary judgment is refused. *Wright v. Wright, 154 Tex. 138, 274 S. W. 2d 670 (1955); Wyche v. Noah, 288 S. W. 2d 866 (Tex. Civ. App., 1956).* Thus, the language quoted is consistent with it being an admonishment to trial judges to go slow in granting a summary judgment as no reversible error will be committed. And that explanation is consistent with the test applied to the grant of summary judgment being the same as the test applied to motion for judgment not withstanding the verdict. And, that this is the case is supportable. For the Dallas Court of Civil Appeals which decided the *Loud* case is one of the courts which has said that the test applied to summary judgment and directed verdict is the same. *Mesquite v. Scyene, 295 S. W. 2d 276, 281 (Tex. Civ. App., 1956—writ of error refused, no reversible error).*

Since the Court of Appeals below did not follow the law of Texas, a typical situation is presented in which this

Honorable Court has on a number of occasions granted Writs of Certiorari. *Erie R. Co. v. Tompkins, 304 U. S. 64; Fidelity Union Trust Co. v. Field, 311 U. S. 169, 85 L. Ed. 109 (1940); Six Companies v. Joint Highway District No. 13, 311 U. S. 180, 85 L. Ed. 114 (1940)*, and *West v. American Tel. & Tel. Co., 311 U. S. 223, 85 L. Ed. 139 (1940)*. See also *Rules of Decision Act, 28 U. S. C., Section 1652.*

2. Whether the United States Court of Appeals for the Fifth Circuit, by applying to the facts of this case a rule of law applied by the Texas courts in cases involving crucial facts not present in this case, has so extended that rule as to emasculate the Texas policy (as announced by State statute and State court decisions) in regard to employers who are eligible to subscribe to a workmen's compensation plan but who are non-subscribers and has, therefore, made such an untenable decision of an important question of State law as to call for the exercise of this Court's supervisory jurisdiction over lower federal courts?

In Texas it is well settled that an employer has a duty to furnish his employees with safe instrumentalities and a safe place to work. It is also settled law in Texas that an employer has the duty to exercise reasonable care in providing his employees with adequate help in the performance of work required of them. Both duties are continuous and non-delegable.

Western Union Tel. Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977, 978 (1947);

Morgan v. State, 170 S. W. 2d 648 (Tex. Civ. App., 1942), reversed on other grounds, 140 Tex. 620, 170 S. W. 2d 652 (1943).

The duty to furnish sufficient help applies with reference to the force of employees as a whole as well as to the number assigned to do a particular piece of work.

Galveston, H. & S. A. Ry. v. Brown, 181 S. W. 238 (Tex. Civ. App., 1915), err. ref.;

Bonn v. Galveston, H. & S. A. Ry., 82 S. W. 808, 812 (Tex. Civ. App., 1904).[9]

Liability attaches as to injury caused as a result of negligence in failing to discharge those duties. And negligence is generally defined by Texas courts as "the doing of that which a person of ordinary prudence would not have done under the same or similar circumstances, or the failure to do that which a person of ordinary prudence would have done under the same or similar circumstances."

Great Atlantic & Pacific Tea Co. v. Evans, 142 Tex. 1, 175 S. W. 2d 249, 250 (1943);

Also, *Stone & Webster Engineering Corp. v. Goodman, 167 S. W. 10, 12 (Tex. Civ. App., 1914), err. ref.*

The standard to test the question of negligence vel non under Texas court holdings is "the common experience of mankind, and implies generally the want of that care and diligence which ordinary prudent men would use to prevent injury under the circumstances of the particular case."

Great Atlantic & Pacific Tea Co. v. Evans, 142 Tex. 1, 175 S. W. 2d 249, 251 (1943).

[9]Both cases were cited with approval by the Texas Supreme Court in *Western Union Tel. Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977, 978 (1947.)*

And it is equally clear under Texas law that where injury is charged to be the result of an omission to perform a duty devolved upon the person charged, the duty must be considered with reference to the character of the business in which the person is engaged.

Great Atlantic & Pacific Tea Co. v. Evans, 142 Tex. 1, 175 S. W. 2d 249, 251 (1943).

As said in the *Evans* case, supra,

> "Negligence rests primarily upon two elements: (a) reason to anticipate injury, and (b) failure to perform the duty arising on account of that anticipation." *175 S. W. 2d 249, 251.*

It is also clear that since Respondent, Sears, though eligible, has not subscribed to a workmen's compensation plan (R. 150-151, 229-230), it is deprived under Texas law of the defenses of contributory negligence, assumption of the risk and the fellow servant doctrine.

Sears, Roebuck & Co. v. Robinson, 154 Tex. 336, 280 S. W. 2d 238 (1955).

The Court of Appeals below purports to have applied the above settled Texas law to the facts of this case. The conclusion was reached and it was held that there was no evidence of record or reasonable inferences to be drawn from evidence of record which could support, under Texas law, the jury finding below[10]—that Respondent was negligent in failing to furnish Petitioner with sufficient help and that such negligence resulted in injury to Petitioner and that such injury could have been anticipated.

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[10]But see Note 2, supra.

But as can readily be seen from the cases relied on (discussed in Question 1, supra), they are clearly distinguishable on their facts. The Court below in extending the application of those cases to the facts of the case at bar, has not only reached a result which directly conflicts in principle with the *Robinson* case, supra, but has laid down a rule of law which completely emasculates the Texas policy in regard to employers who are eligible but have failed to subscribe to a workmen's compensation plan for the benefit of their employees.[11]

In the *Robinson* case, supra, plaintiff had been injured when he slipped on oil on the floor of the warehouse where he was working. He had known the oil was on the floor but did not think he would slip on it. The defendant, Sears, defended on the ground that there was no evidence that it knew or should have known the oil was on the floor and that in any event it had no duty to warn or otherwise protect the plaintiff from a danger that was open and obvious and which he could have avoided. This argument was rejected by the trial judge, the Court of Civil Appeals and the Supreme Court of Texas. The latter court pointed out that Sears, though eligible, had not subscribed to a workmen's compensation plan and was therefore deprived under Texas law of the defenses of contributory negligence and assumption of the risk. The court recognized that the defense Sears asserted was, under Texas law, as to a landowner-invitee relationship, considered not a defense based on assumption of the risk but as a defense based on the ques-

[11]And has usurped the traditional function of the jury by setting itself up as the finder of facts. See Notes 2 and 3, supra.

tion of primary negligence on the part of the defendant. However, the court made it clear that, whatever the theory of the defense had been, in actuality it was but another way of saying the plaintiff had assumed the risk. The court further said:

> "While the nature of the duty of the landowner to use reasonable care to make his premises reasonably safe for the use of his invitees may, in all material respects, be identical with the nature of the duty of the master to use reasonable care to provide his servant with a reasonably safe place to work, we see no sound reason for extending the no-duty concept of denying liability from the landowner-invitee field of the law to the master-servant field. Certainly the concept should not be so extended when its extension would serve to defeat and nullify the obvious and clearly expressed intention of the Legislature to take away from the non-subscribing employer the defense of assumed risk and to make him liable where he created or failed to correct an unsafe condition of the premises on which his servant was compelled to work." *280 S. W. 2d 238, 240.*

In the case at bar, Respondent contended and the Court of Appeals below adopted the argument that since it was left up to Petitioner to ask for help and since Petitioner not only did not ask for help on this occasion and had thought himself that he "could have done it" (make delivery without injury), that Respondent therefore had no way of knowing that he could not. But this reasoning fails to appreciate exactly what Petitioner's contention was. Petitioner was contending, and the evidence supports the contention, that two men equipped only with the dolly furnished were not sufficient manpower to make safe delivery,

under normal conditions, of a bulky, 361 pound deep freeze (R. 90-93, 96, 105, 107, 216); and although they might in fact make deliveries without injury it would be because they did not make any mistakes of judgment and had exercised an extremely high degree of care for their own safety and not because the help furnished was sufficient to make safe deliveries of such heavy items.[12]

The Court below has done exactly what the Texas Supreme Court in the *Robinson* case, supra, said should not result. Respondent has been allowed to convert what used to be regarded as evidence showing assumption of the risk into evidence negativing the existence of negligence on its part.

The holding of the Court below amounts to no more than saying that Respondent and employers similarly situated can circumvent the Texas Workmen's Compensation policy by saying in effect to their employees—

> You and your helper deliver this bulky, 361 pound deep freeze to X address in the country. Remember, don't get hurt, use extreme care for your own safety. If when you arrive at this address you decide that you cannot, with the exercise of extreme care for your own safety, make safe delivery with the assistance we have furnished you, you call us for help as we are making you our investigator as well as our delivery man. We will not have any help to furnish, however, as we do

[12]See *Gibson v. Phillips Petroleum Co., 1 L. Ed. 2d 77 (1956) (No. 339, Oct. Term, 1956)*, where this Court reversed the United States Court of Appeals for the Fifth Circuit for having held the petitioner in that case up to a similar high degree of care for his own safety, in conflict with Texas court decisions.

not have any extra employees; and since your route is in the country and takes all day to work, we will not be able to afford to take men from other routes as we cannot spare them that long. But call anyway and we will not tell you to bring the deep freeze back; for that will not solve the problem—our customers' purchases will still have to be delivered and bringing the freezer back will not produce us extra employees to help you or shorten your route and we will still not be able to afford to spare employees from our other routes for such a long trip. On the other hand we will not direct you not to bring the freezer back. But remember, if you do we might get someone else to deliver it and you may be out of a job. However, do not forget—we have told you to call for help. Do not forget that now; for if you are injured by attempting to deliver in order to keep your job and bring a suit against us for damages we will need a defense as we do not carry workmen's compensation.

The decision of the Court below is so clearly erroneous and untenable that for this reason alone this Court should exercise its jurisdiction under 28 U. S. C. Section 1254(1) and Supreme Court Rules No. 19(b).

3. The questions here presented have great importance and far reaching effect.

The State of Texas has seen fit to try to protect its working people from the hazards of their employment by providing for workmen's compensation coverage. Employ-

ers who are eligible for such coverage are required to subscribe to such a compensation plan or suffer suits for damages without the availability of such defenses as assumption of the risk, contributory negligence and the fellow servant doctrine. The effect of the decision below makes the loss of those defenses no longer a detriment, if the suit is brought in or removed to a Federal Court, as the Fifth Circuit has allowed evidence which normally shows the existence of some assumed risk or contributory negligence to be used as showing no primary negligence. The effect of this will be far reaching and involve the rights of many thousands of working people. It is therefore important that this Honorable Court grant a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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and

THOMAS H. HIGHT,
Gulf States Building,
Dallas, Texas.

By.....

A copy of the foregoing Petition for Writ of Certiorari was on the ..... day of April, 1957, served on Mr. Pinkney Grissom and the firm of Thompson, Knight, Wright & Simmons, Republic National Bank Building, Dallas, Texas, Attorneys for Respondent.

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APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,960

SEARS, ROEBUCK & COMPANY,

Appellant,

versus

KENNETH TALLEY,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(December 14, 1956.)

Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

HUTCHESON, Chief Judge: The suit was for personal injuries claimed to have been sustained by plaintiff while in the employ of the defendant, a non-subscriber under the Texas Workmen's Compensation Act.

The claim was that on November 23, 1952, while attempting to deliver a deep freeze, plaintiff, the driver of a local delivery truck, had received the injuries complained of as the proximate result of appellant's negligence in failing to supply him with proper and necessary mechanical appliances and sufficient help.

The defenses were a denial that defendant was in any respect negligent and an affirmative claim that the actions of the plaintiff himself were the sole proximate cause of his injuries.

The case was tried to a jury on evidence[1] which presented no conflict in the facts, and, at its conclusion, defendant moved for an instructed verdict on the ground that, upon the undisputed facts, there was no proof of negligence. This motion denied, there was a verdict for

[1]Briefly but fully summarized, this is the evidence:

Appellee, at the time of his asserted injury an employee of appellant, was, and had for some time prior thereto been, a driver of a local delivery truck on a rural route.

Each morning appellee and his helper, after reporting to work and picking up their truck, would load the merchandise they were to deliver. Appellee actually handled each item and knew both the size and weight of each. To a lesser extent this information was also known to appellant's supervisors who had a load sheet showing generally, but not specifically, the size and weight of the items loaded on each truck.

On the particular day in question, appellee was to, and did, deliver a 361 pound deep freeze unit to the home of a Mr. Stultz in Richardson, Texas.

After arriving, appellee was requested by the customer to place the deep freeze in the garage. Across the driveway there was a phone or light line about 10 to 12 feet high, and the truck having a pipe rack which was higher, appellee was of the opinion that the truck would strike the wire if he backed his truck up to the garage. Also, there was a vehicle parked in the driveway which required him to stop his truck about 25 yards from the garage.

The driveway was covered with loose gravel, and, because the patio and lawn along side it were rough, appellee concluded he could not use the dolly which appellant had furnished to him. These unusual and

(Footnote 1—continued on p. 43.)

the plaintiff for $20,000, and, after a remittitur of $8000, a judgment for $12,000.

Appealing from the judgment, defendant is here insisting: that under the settled Texas rule, laid down in *The Great Atlantic & Pacific Tea Co. v. Evans*, 142 Tex. 1, 175 S. W. 2d 249, and *Western Union v. Coker*, 146 Texas, 190, 204 S. W. 2d 977, and uniformly followed in the state, there is no legal basis for a finding that plaintiff's injuries were proximately caused by any negligence on defendant's part; and that its motion for an instructed verdict should have been granted. As subordinate grounds, it assigns as error that the court failed to give in charge to the jury defendant's special instructions: (1) that if it did not find

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(Footnote 1—continued from p. 42.)

unanticipated circumstances, in his opinion, made it necessary to carry the freezer from the truck into the garage. The vehicle in the driveway made it necessary to cross both the patio and the lawn.

Without reporting these circumstances or asking help or instructions, appellee and his helper unloaded the freezer without accident from the back of the truck, and then proceeded to carry it toward the house. On the way the helper, who was carrying the light end, almost dropped it, throwing all the weight onto the appellee. Either Mr. Stultz or both Mr. Stultz and his son then helped carry the freezer the remaining distance. When they set the freezer down in the garage, appellee felt a pain in his right knee.

Appellee testified that he had been instructed by appellant to call for help when needed and whether or not help was required was left to the individual driver.

There was no evidence that two men were insufficient. On the contrary, the evidence was that it was, and had been the uniform custom and practice of the defendant to send two men out and no evidence was offered of any other practice by any others engaged in the delivery of such ice-boxes.

Indeed, both appellee and his assistant testified that two men would be sufficient to load and unload a freezer of the type appellee was handling when injured. When he loaded the freezer involved in the accident, appellee said nothing about needing help to unload. In fact he testified, "It looked to me like we could have done it." To the question, "Now at the time you started to lift the freezer, did you have any reservation in your mind about the two of you, you and your helper, being able to handle that job by yourselves?" Ans.: "No, sir, I didn't because we have handled them all the time."

that plaintiff's actions were not the sole proximate cause of the accident in question, it should find for defendant; and (2) that if the temporary inadequacy of help, if there was such, was unknown to defendant, it was not negligent in failing to supply additional help; and that the court, in its supplemental instructions erroneously directed the jury that it should not consider plaintiff's conduct but only that of defendant.

Because, for the reasons hereafter briefly stated, we are in doubt that appellant's primary ground of error is well taken, we will not undertake to discuss the other grounds. In the excellent annotation in 36 A. L. R. (2) beginning at page 8, "Failure to furnish assistance to employee as affecting employer's liability for injury or death of employee," the cases, federal and state, are marshalled and discussed in a thorough and workmanlike manner, and were it not for the fact that the Texas courts have spoken with precision and authority, we might find it difficult to reach, state, and apply with authority the principles controlling here.

The statement and application of those principles, however, in the Great Atlantic & Pacific and Western Union cases, *supra*, and the consistency with which they have been followed and applied[2] make it unnecessary for us to do more than to briefly state the principles and point to the undisputed facts here which require the conclusion that a verdict should have been directed.

[2]August v. Texas & N. O. Co., 265 S. W. 2d 148 (Tex. Civ. App., 1948); Jackson v. Marshall, 243 S. W. 2d 205 (Tex. Civ. App., 1951); Shumake v. Gr. Atlantic & Pac. Tea Co., 255 S. W. 2d 949 (Tex. Civ. App., 1953).

In the Great Atlantic case, at pages 4 and 5, the Supreme Court thus categorically sets them down and applies them:

"1. As generally defined by our courts, the term 'negligence' means the doing of that which a person of ordinary prudence would not have done under the same or similar circumstances, or the failure to do that which a person of ordinary prudence would have done under the same or similar circumstances. 30 Tex. Jur., pp. 647-8.

"The standard to test the question of negligence vel non is the common experience of mankind, and implies generally the want of that care and diligence which ordinarily prudent men would use to prevent injury under the circumstances of the particular case. Southern Cotton Press. & Mfg. Co. v. Bradley, 52 Texas 587; International & G. N. Ry. Co. v. Gray, 65 Texas 39.

"2. The question of the existence of negligence and its degree generally depend upon the facts of each case; and if it consists of an omission to perform a duty devolved upon the person charged with negligence, it must be considered with reference to the character of the business in which the person is engaged. San Antonio St. Ry. Co. v. Gaillonette, 79 Texas 341, 15 S. W. 390."

"3. Negligence rests primarily upon two elements: (a) reason to anticipate injury, and (b) failure to perform the duty arising on account of that anticipation. Collins v. Pecos & Northern Texas Ry. Co., 110 Texas 577, 212 S. W. 477, 222 S. W. 156; Johnson v. Wichita Valley R. R. Co., 104 S. W. 2d 128.

"Although injury may result from a person's act or omission, yet, if the actor could not have reasonably foreseen the resulting injury, or injuries similar in character, he is not to be held responsible therefor. 30 Tex. Jur., p. 663, and authorities there cited; Texas

& Pacific Ry. Co. v. Bigham, 90 Texas 223, 38 S. W. 162; Union Stock Yards v. Peeler (Com. App.), 37 S. W. 2d 126.

"4. Measured by the above rules of law, we are convinced that the facts of this record fail, as a matter of law, to convict A. & P. of actionable negligence. Evans was a strong, robust young man. He was merely required to perform work that he had been doing for this same employer for several months before this occasion. He was doing the same character of work that other employees in other grocery stores constantly and generally did. He was doing the same character of work that he constantly and generally did in other grocery stores where he had been employed prior to his employment by A. & P. Certainly such a record cannot support a finding of actionable negligence. Certainly Evans cannot complain if A. & P. merely require him to do the usual and customary work required of persons in his line of employment, or, stated in another way, required by the character of the business in which he was employed. Finally, we think that the facts of this record fail, as a matter of law, to show that A. & P. ought to have foreseen that Evans would be injured by doing the character of work required of him in this instance."

In the Western Union case, plaintiff had claimed that he should have had a man helping him in performing the work in which he was engaged when injured, and the jury had found that defendant had failed to exercise ordinary care in not furnishing such help. After stating the facts, which included testimony that the plaintiff was an experienced carpenter who had worked for defendant off and on for about four years, and that he and two other witnesses, who were not present when the accident occurred,

had given their opinion that for the safety of plaintiff and those who had been nearby, another man should have been present, the Supreme Court, holding that the defendant's motion for peremptory instruction should have been granted, thus restated the applicable principles:

> "The law imposes upon the employer the duty to exercise reasonable care in providing for an employee adequate help in the performance of work required of him. The duty is non-delegable and continuous, the rule being in principle the same as that requiring the employer to furnish his employee with safe instrumentalities and a safe place to work, Bonn v. Galveston, H. & S. A. Ry. Co., 82 S. W. 808; Galveston H. & S. A. Co. v. Brown, 181 S. W. 238; Jarvis v. Erwin Cotton Mills Co., 194 N. C. 687, 140 S. E. 602; 39 C. J., pp. 523-525, Secs. 627-630; 35 Am. Jur., pp. 626-627, Sec. 197; Labatt's Master and Servant (2nd Ed.), Vol. 3, pp. 2912-2915, Sec. 1107.
>
> "The text last cited, in addition to the statement of the general rule, contains on page 2914 the following: 'So far as the movements of servants may depend upon their own volition, and are not in any way affected by the control of a superior, it is clear that there can be no recovery on the theory that the number of servants was temporarily inadequate at the time and place where the injury was received, unless it is shown that such inadequacy was known, actually or constructively, to the master or his representative.' See also 35 Am. Jur., p. 626, Sec. 197.
>
> "The employer is not liable when he has provided help and injury results from the act of the employee in voluntarily proceeding to do work without assistance. The same is true when sufficient help is nearby and available and the employee does the work alone without seeking or asking for assistance. Hines v. Ross, 230 S. W. 1066; Melton v. Texas & N. O. Ry.

Co., 254 S. W. 510; Jarvis v. Erwin Cotton Mills Co., 194 N. C. 687, 140 S. E. 602; 39 C. J., p. 525, Sec. 630."

After citing the Great Atlantic case with approval and setting out more fully the facts of the accident in the case under review, the court concludes thus:

> "We find no evidence of negligent failure on the part of petitioner to provide help for respondent. A helper had been provided. There is no evidence of how long he helped respondent, or how long he had been away at the time of the accident, or where he was. He may have been temporarily absent. He may have been nearby and subject to call. Respondent's testimony shows that he made no effort to find the helper. He merely looked around and, seeing that neither the foreman nor the helper was there, voluntarily proceeded with the work, the removal of the plate, that he believed it was dangerous for him to do without help. Before he removed the plate respondent had been knocking off the sheet rock and taking down the studding, which he said was a job that one man could easily do. During that time a helper was not needed. There is nothing in the record to show that the employer or the employer's foreman knew or should have anticipated that respondent, immediately before the end of his day's work, would undertake alone a task that he could not safely perform without help, or that he would do so without seeking or asking for help. In our opinion there is no foundation in the evidence for a finding of negligence on the part of petitioner."

Other cases approving and applying these principles to different states of fact are set out in note 2, *supra*. No case from this state has been cited to, or found by, us which in any way departs from or modifies them.

The Loud case, 262 S. W. 2d 548, which appellee cites as supporting his position, was an appeal from a summary judgment. In it the Court, in no manner undertaking to depart from or limit the Western Union decision, and devoting many pages to a discussion of the Texas rule approving use of summary judgment procedure in negligence cases only in exceptional cases, reversed the judgment for a full development of the facts in a trial on the merits.

For the error in not granting the motion for directed verdict and entering judgment for defendant, the judgment is REVERSED and here RENDERED.

A True Copy:
Teste:

.....
Clerk of the United States Court of
Appeals for the Fifth Circuit.

APPENDIX B

JUDGMENT

Extract from the Minutes of December 14th, 1956

No. 15,960

SEARS, ROEBUCK & COMPANY,
versus
KENNETH TALLEY,

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this Cause be, and the same is hereby, reversed; and judgment here rendered for appellant, Sears, Roebuck & Company;

It is further ordered and adjudged that the appellee, Kenneth Talley, be condemned to pay the costs of this Cause in this Court for which execution may be issued out of the said District Court.

ORDER DENYING REHEARING

Extract from the Minutes of January 10th, 1957

No. 15,960.

SEARS, ROEBUCK & COMPANY,
versus
KENNETH TALLEY.

It is ordered by the Court that the petition for re-hearing in this cause be, and the same is hereby, denied.

Office - Supreme Court, U.S.
FILED
APR 8 1957
JOHN T. FEY, Clerk

No. 889

NUMBER 15960

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

SEARS, ROEBUCK & COMPANY, *Appellant*

VS.

KENNETH TALLEY, *Appellee*

APPELLEE'S PETITION FOR REHEARING AND REQUEST FOR ORAL ARGUMENT

U. S. COURT OF APPEALS
FILED
DEC 31 1956
JOHN A. FEEHAN, Jr.
CLERK

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NUMBER 15960

IN THE

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FOR THE FIFTH CIRCUIT

SEARS, ROEBUCK & COMPANY, *Appellant*

VS.

KENNETH TALLEY, *Appellee*

APPELLEE'S PETITION FOR REHEARING AND REQUEST FOR ORAL ARGUMENT

To the Honorable Court of Appeals:

The opinion of this Honorable Court materially limits the right of an employee to recover for personal injuries sustained because his employer has failed to furnish sufficient help in the work he is employed to do. By virtue of this Court's opinion it is practically impossible for an employee to recover under such circumstances. With all

due respect to the Court, Appellee sincerely believes that this Honorable Court erred in the following particulars:

1.

The Court erred in holding that there was no evidence to support the verdict of the jury.

2.

The Court erred in holding that the trial court should have granted Appellant's motion for an instructed verdict.

3.

The Court erred in holding that the trial court wrongfully refused to grant Appellant's motion for judgment N. O. V.

We agree with the court's clear enunciation of the law in its opinion. Apparently the appellee has failed in some way to make the facts in this case clear to the court, for these facts place this case squarely within the doctrines of the *Evans* and *Coker* cases, as set out in this court's opinion. It is our contention that following that law the court should have upheld the verdict in this case rather than reversed and rendered.

There is evidence to prove that Sears failed to provide Kenneth Talley with that help (equipment and/or men) which a reasonable and prudent employer would have provided its employees for the performance of work required of them.

There is evidence to prove that this failure to provide adequate help was not a temporary inadequacy caused by Talley's voluntarily proceeding to do work without assistance where assistance was available.

These are the requirements of *Western Union Telegraph Co. vs. Coker*, 204 SW 2d 977, and plaintiff would show this court that they have been met.

1. Plaintiff contended and offered evidence to prove that Sears FAILED TO PROVIDE ADEQUATE HELP.

What help, if any, was necessary? The uncontroverted evidence is that Sears knew precisely what each item was that the driver would carry on his route on any given day (Tr. 28, 29, 30), its exact size and weight—361 lbs. (Tr. 29), and the probable nature of the area in which the delivery would be made as well as the possible difficulties a driver might face in such areas. Luther Wyatt Hudler, supervisor for Sears, testifies:

"Q. When you pick up a load sheet, and say somebody is going to make a delivery on Route 4, Dallas—

A. Yes, sir.

Q. —that is out in the country?

A. Yes, sir.

Q. No street?

A. No, sir.

Q. The houses far apart?

A. Yes, sir.

Q. MAYBE A FARMER RIGHT IN THE MIDDLE OF A 500 ACRE PASTURE?

A. YES, SIR." (Tr. 44)

Plaintiff submits that this testimony shows Sears knew it was asking its employee to deliver a heavy, bulky item to an address where it was likely the ground would not be even or paved and that some specialized equipment was necessary. By this testimony plaintiff contends that Sears knew or had reason to know that if such equipment was inadequate for uneven, unpaved terrain or bulky heavy objects, plaintiff would be required to hand carry such items. (Plaintiff does not contend this necessarily made the accident foreseeable as required by the *Evans* case which will be discussed under paragraph 2.)

The only equipment provided besides a truck and sash rope was a dolly. Only two types of dollys were provided for plaintiff or any other rural route carrier. The type Mr. Talley had and the type every other route man had. (Tr. 40) The type Mr. Talley had had small wheels which would not go over uneven, unpaved terrain, especially with a heavy object on it. (Tr. 90, 92) The other type (2 wheel) dolly permitted a tall or long object to come up over the handles of the dolly making it impossible for a worker to get a safe grip on the dolly. (Tr. 90-92) Plaintiff testifies at Tr. 92:

> "Q. It is your testimony that every driver who had a two wheeled dolly at that time on his truck was operating with insufficient equipment?
>
> A. Yes, sir."

The preceding testimony proved that the defendant provided plaintiff and all other routemen with nothing in the way of dollys that would help them deliver heavy or bulky objects over uneven ground. Merely allowing plaintiff a CHOICE BETWEEN TWO INADEQUATE TYPES OF DOLLYS does not change the fact that Sears failed to provide its rural routemen with dollys that would permit them to do their normal work without considerable hand lifting.

There was no special equipment available for the delivery of heavy or bulky items other than these two types of dollys which were inadequate for the job. The testimony of Sears' supervisor, Mr. Hudler:

> "Q. Even though it is a big item, the only equipment available to him (driver) is that same old dolly he got the day he was assigned to a truck, is that right?
>
> A. Yes, sir." (Tr. 43)

There was no equipment room where extra dollys were kept (Tr. 32) and no other mechanical aid was furnished such as a hydraulic lift or truck tailgate, derrick, frame, chain drive, etc. (Tr. 56)

Since Sears failed to provide adequate equipment, the only help plaintiff had was one helper. Plaintiff contended and offered evidence to prove that two men were inadequate to safely deliver a 14′ deep freeze. (This evidence is quoted quite fully since at p. 3 of the court's opinion it is stated that there was no evidence on this

point. We regret our fault in not calling this to the court's attention earlier.)

Testimony of Mr. Luther Hudler, former Sears rural routeman, 2r. 216:

"Q. Ordinarily, Mr. Hudler, in the delivery of an article such as a 14' deep freeze, unless there were complications, two men were ample to do that delivery work?

A. I DON'T THINK SO, ON 14 FOOT."

Plaintiff's testimony, Tr. 96:

"Q. Ordinarily, when you were in the process of unloading or delivering a deep freeze as such, it can be done by two men without any difficulty?

A. It was done, but it was difficult.

Q. It may be a little straining, but there never was any danger, so far as you could tell?

A. I couldn't answer that truthfully.

Q. Wasn't it the usual and customary practice in the truck driving business that two men would be sufficient to load and unload deep freezes and refrigerators of this type?

A. IF THEY HAD PROPER EQUIPMENT, YES."

Testimony of Ross Earl Stultz, owner of the premises where the deep freeze was being delivered, Tr. 193-194:

"Q. The minute those men strated out with that box you, as an ordinary citizen, with no training in moving, could tell it was too heavy for them?

A. That was my opinion, and I offered my service, and my son's to assist them.

Q. You haven't moved any appliances at all but you could tell when they started out it was too heavy?

A. I wouldn't say I haven't moved appliances; I have moved them around the house; and I realized that box was entirely too heavy for two men to carry.

Q. Have you ever helped anybody else carry stuff into your house?

A. Yes, sir.

Q. You have?

A. Yes, sir.

Q. Under similar circumstances?

A. About six months ago I bought a piano and there was a couple of fellows come out to deliver it and I offered my assistance, I thought it was too heavy for them to carry, but they had SPECIAL EQUIPMENT and they assured me they could carry it on it." (All emphasis ours)

We submit that the evidence cited and testimony quoted from the record on these preceding pages, is sufficient to uphold the jury's verdict that Sears failed in fact to provide Kenneth Talley with that help which a reasonable and prudent employer should have provided its employees for the performance of work required. We don't say that Sears had to have better equipment or be negligent, or that they had to have more men available or be negligent. We do say that there is plenty of evidence here for a jury to find that a reasonable and prudent employer would have provided one or the other.

Was such failure a *temporary inadequacy*, or phrased differently, was plaintiff a *volunteer?* No.

It might be said that plaintiff was a volunteer if he had done some task which his employers had no reason to expect him to do or which required effort his employers had no notice he would be called upon to exert. It is uncontroverted that plaintiff acted on specific instructions to deliver a 361 lb. 14' deep freeze to a rural route address which his employer stated might be on an unpaved street in the middle of a 500 acre pasture (Tr. 44) with one helper assigned and that he used that helper, the only one there available to him. It must be pointed out that plaintiff was not a volunteer in the sense that that word is used in any of the cases cited in Sears' brief. He was doing what was expected of him and using all the help Sears provided him with.

Coker case — plaintiff had had a helper all day but had started doing work he could do alone and then without any orders to do so and without asking for help thought to be in the next room had been injured doing a job that required two men.

Hines vs. Ross, 230 SW 1066 — Plaintiff was not specifically ordered to perform the task; could have secured help (p. 1066); two people usually did work that plaintiff did alone this time through choice; degree of exertion was in plaintiff's control.

Melton vs. Texas, & N. O. R. Co., 254 SW 510 — help right by plaintiff's side but not used. Four workers were on top of a flat car throwing off wet crossties. Plaintiff was injured when he slipped while voluntarily throwing one off by himself.

August v. Texas & N. O. R. Co., 265 SW 2d 148 — Plaintiff had other human help within sight; he had other equipment there with which to do the work but it would have been slower. Also proper equipment to do the work plaintiff's faster way, without lifting, was available generally—kept in tool house and some assigned to him—but just temporarily absent.

Railway Express Agency, Inc. v. Gray, 211 SW 2d 1013 — here plaintiff recovers because of the negligence of a fellow employee in letting go of a safe; judgment is affirmed because there is some evidence to support the verdict and every reasonable intendment must be indulged. This case is evidently cited at this point by Sears through error.

Sears does not dispute that plaintiff was following orders, that he was using the one helper regularly provided; but it is their contention that if this one helper was not enough, plaintiff had been given three instructions or rules to follow, and because he did not follow these rules plaintiff was a volunteer. It is our contention that the proof showed these three "rules" provided *no actual help*

to the employee, and that the proof showed two of these "rules" did not exist. These "rules" were:

1. Request extra men when you need them, and we will make them available. Sears' supervisor (who had been supervisor 5 years, a truck driver for Sears 8 years before that, Tr. 24) testified that Sears had NEVER PROVIDED extra men on rural routes (Tr. 45) claiming they had never been requested. Plaintiff proved that on at least two occasions extra men were requested and not provided. On one such occasion plaintiff requested extra men to help bring an icebox downstairs and they were not given (Tr. 84). On another occasion his predecessor requested extra men and was told Sears couldn't afford to send three or four men on a rural route (Tr. 212). Sears supervisor on close questioning admitted that from the time the men left on their routes in the morning until they returned to punch out, there weren't any extra men to send (Tr. 133, 134). *Sears supervisor admitted that four men were sent on request in town to deliver extra heavy items twice a week, approximately* (Tr. 45). (There were 17 routes in all, 10 town routes and 7 rural routes, Tr. 45, but extra men had never been sent on rural routes.) Plaintiff submits this is ample evidence on which a jury could find that there were no extra men actually available to rural routemen whether they requested them or not, and that this was general practice, not a temporary state of affairs. What Sears *provided*

was an excuse for itself in case of suit, not available extra men.

2. Hire extra men on the spot. It was not contended that such instructions were written down or posted anywhere but if given were given orally (Tr. 53). On questioning Sears supervisor again admitted that no money had ever been advanced for this purpose, no office system devised or printed slips made for employee's use in obtaining reimbursement (Tr. 53). The supervisor who had been with Sears thirteen years was able to recall only that this hiring of additional men by a routeman had taken place on occasion, not how often it did happen except to say it doesn't happen once a year (Tr. 54). Plaintiff testified he did not ever remember being given this instruction (Tr. 109). Again there was ample evidence for the jury to believe that such instructions were never made nor expected to be followed, and that it was just an excuse.

3. Return the item undelivered. Plaintiff denies that this instruction was made to him (Tr. 108). Sears' own witness, Mr. Sims, called to testify that he had been given the second instruction (above) stated that he had not been given this third one himself (Tr. 197, 198) though he says he once returned merchandise undelivered. Again there was ample evidence for the jury to believe that this instruction or rule was never made, and was another excuse.

For the court to hold that an employee is a mere volunteer and his employer therefore innocent of negligence in the face of evidence that the employer failed to *provide* its employees sufficient help merely because the employer has been clever enough to think up operating "rules" that could be an excuse for such failure, places all employees in an impossible position.

It is only where the employer has *provided* adequate equipment and/or *provided* a safe number of men, and then the employee has proceeded alone or ignored this help, that the employer should have available to him the defense "You are a mere volunteer." *Western Union v. Coker*, supra. A check of all the volunteer cases cited by Sears in their brief shows that the employer in those cases could meet the "*providing* adequate help" test. Under the facts in this case, Sears can not.

The fact of providing, and an answer to the question, "Did the employer provide sufficient help?" must be the test of the employers conduct otherwise all a negligent employer has to do is issue a series of instructions such as "Don't overstrain," "Don't be negligent" and he doesn't care if they are followed or not. He has avoided liability. An instruction or "rule" of this type, if it has any significance, has to do with assumption of risk, which is not a defense in this case. And Texas courts are not sympathetic and attempts to reason around this forbidden defense by merely renaming it. *Sears, Roebuck & Company vs. Robinson*, 280 SW 2d 238.

We respectfully submit that the above evidence in this case proves that the standard operating procedure of Sears failed to provide their rural routemen with that help which a reasonable and prudent employer would have provided, and that such failure was not just a temporary inadequacy, of which Sears had no notice.

2. There is evidence to prove that a reasonable and prudent employer could have foreseen that injury to the plaintiff would result from the performance of his duties with the help provided.

This is the requirement of *Great Atlantic & Pacific Tea Co. v. Evans*, 142 Tex. 1, 175 SW 2d 249, and plaintiff would show this court that it has been met.

Sears says plaintiff regularly made rural deliveries in this manner and our other rural drivers regularly did their work in this manner, therefore there was no foreseeability that our methods would cause injury. Plaintiff's answer is that proof of prior injuries is universally taken to be evidence of foreseeability of future ones, and in this case there was testimony from three witnesses about prior injuries. (1) Plaintiff's predecessor doing his work in Sears' regular manner hurt his back lifting (Tr. 214). (2) Plaintiff had strained a leader in his stomach one time before while lifting at Sears (Tr. 96). (3) Plaintiff's helper, called by Sears to testify that he didn't remember plaintiff's injury, said the reason was that some one was always hurt down there (Tr. 168); in fact he had been hurt himself (Tr. 169) during the approximately six or

seven months he worked there as a helper (Tr. 168). If it is true that safety history evidence indicates lack of foreseeability as Sears contends the *Evans* case holds, is not the converse true? That an unsafe history indicates the employer had reason to foresee the plaintiff's injury.

There is no evidence of prior injuries in any of the cases cited in appellant's brief on this point. The following cases were checked: *Evans* case, *Turnbow v. Panhandle & S. F. Ry. Co.*, 127 SW 2d 982; *Shumake v. Great Atlantic & Pacific Tea Co.*, 255 SW 2d 949; *Hairston v. Oakwood Cemetery Ass'n.*, 94 SW 2d 493; *Jackson v. Marshall*, 243 SW 2d 205. Also appellants' cases cited under paragraph 1 above were checked and found to contain no evidence of prior injuries, as was the case of *Great Atlantic & Pacific Tea Co. of America v. McConnell*, 199 F. 2d 569 (5th Cir. 1952), from which appellant quoted Chief Judge Hutcheson's dissent. (This last case was a most liberal holding for the plaintiff interpreting Florida law. If the court will now follow the reasoning of the dissent in that case, which cited Texas law, this judgment will be affirmed.)

The opinion in the *Evans* case was also based in large part on proof offered by the defense which is totally lacking in this case. At page 251 of 175 SW 2d, the court in the *Evans* case says, speaking of Evans:

> ". . . He was doing the same character of work that *other employees in other grocery stores* constantly and generally did. He was doing the same character

> of work that he constantly and generally did in *other grocery* stores where he had been employed prior to his employment by A & P. Certainly such a record cannot support a finding of actionable negligence. Evans cannot complain if A & P merely required him to do the usual and customary work required of persons in his line of employment, or stated in another way, required by the *character of the business* in which he was employed . . ."

In other words A & P was merely following the general custom of grocery stores. Plaintiff would most respectfully show this court that there is not an iota of evidence to show that other movers of heavy appliances, deep freezes or refrigerators use the same methods as Sears.

But Sears says that this particular injury was unforeseeable because plaintiff testified that "it looked to me like we could have done it" (Tr. 105) and again that "he handled them all the time" (Tr. 209). Sears doesn't contend that these remarks amount to a judicial admission, but that they show this accident to have been unforeseeable to plaintiff and that if the plaintiff couldn't foresee injury Sears could not be expected to. *Turnbow v. Panhandle & S. F. Ry. Co.*, 127 SW 2d 982.

Plaintiff answers that these remarks *do not show* that plaintiff could not foresee injury, that is merely Sears interpretation of them arrived at by lifting these remarks out of context. The first remark came at the end of a long cross examination of plaintiff by Sears and before it was said, plaintiff had made it plain that he thought

Sears' equipment was insufficient, that two men were not adequate, that he had hurt himself once before, that he didn't know where he could get help, that he had been ordered to deliver and had not been told to return undelivered. This remark was nothing more than a statement that he understood what he was up against and had been required to deliver under these conditions before and had made it and thought he could do it again. In other words, if anything it was an admission of assumption of risk, not a test for unforeseeability. The second remark is taken from the deposition and even in the small excerpt quoted in the record (Tr. 209) it can be seen that plaintiff is simply no match for his cross examiner. There was no reason for the jury who heard the entire cross examination to put the meaning on these words that Sears did. The trial judge did not do so either.

Plaintiff does not have to prove, nor does he rely on, prior injuries alone to prove that Sears could, in fact, foresee that injury would result to their employees by reason of Sears' failure to provide adequate help. There is also the test of foreseeability based on common knowledge, because what reasonably can be anticipated involves the use of common knowledge, *Pacific Greyhound Lines, Inc. vs. Vermillion*, 87 SW 2d 312 (writ dismissed).

If it was foreseeable to Mr. Stultz based on his common knowledge as a layman that two couldn't safely deliver a 361 lb. deep freeze, it certainly should have been foreseeable to Sears.

It is not necessary either that the particular event be foreseen, all that is required is that some similar event could have been foreseen through the exercise of ordinary care. *Carey v. Pure Distributing Corp.*, 133 Tex. 31, 124 SW 2d 847.

WHEREFORE, having shown the court that: There is evidence to prove that Sears failed to provide Kenneth Talley with that help which a reasonable and prudent employer would have provided its employees for the performance of work required of them; and having further shown the court that a reasonable and prudent employer could have foreseen that injury to the plaintiff would result from the performance of his duties with the help provided; and because the appellee has apparently failed in some way to make the facts in this case clear to the court; appellee therefor believes that oral argument is necessary and desirable that it might be afforded an opportunity to answer such questions as the court may have and to more carefully explain its position and the grounds of the trial court in entering judgment upon the verdict rendered in this case; appellee prays that this court permit oral argument in connection with this petition, and that this court grant this petition for rehearing, with-

drawing its original opinion, and, upon final consideration, affirm the judgment of the trial court.

Respectfully submitted,

CARTER, GALLAGHER, JONES & MAGEE

By .....

Attorneys for Appellee
800 Gulf States Building
Dallas, Texas

Undersigned, Ben T. Warder, Jr., counsel for Appellee, hereby certifys on his behalf that the foregoing petition for rehearing is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well founded in law and proper to be filed herein.

.....

I, Ben T. Warder, Jr., one of the Attorneys for Appellee Kenneth Talley, do hereby certify that copy of the above and foregoing Petition for Rehearing of the Appellee Kenneth Talley has been served upon Appellant Sears, Roebuck & Company, by delivering copy thereof to Mr. David M. Kendall, Jr., Republic National Bank Building, Dallas, Texas, their Attorney of record, on this ..... day of December, 1956.

.....

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FILED
MAY 3 1957
JOHN T. FEY, Clerk

No. 889

In the

Supreme Court of the United States

OCTOBER TERM, 1956

KENNETH TALLEY,

Petitioner,

v.

SEARS, ROEBUCK & COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. .....

In the

Supreme Court of the United States

OCTOBER TERM, 1956

KENNETH TALLEY,

Petitioner,

v.

SEARS, ROEBUCK & COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent, SEARS, ROEBUCK & COMPANY, respectfully files this its brief in opposition to the petition for writ of certiorari and prays that said petition be denied because, as shall hereinafter be shown, there is neither reason nor jurisdiction to grant said writ:

I.

CONTEST TO JURISDICTION

While technically jurisdiction may lie under *28 U. S. C., Section 1254(1)*, this Court does not have jurisdiction under the criteria which it has established. Rule 19, Rules of the Supreme Court of the United States. There is no special or important reason for granting the writ, either under Rule 19(b), which Petitioner invokes, or under any other provision of the Rule. The decision of the Court of Appeals does not conflict with the decision of any other court of appeals on the same matter. The Court of Appeals has not decided an important state question in any way in conflict with the applicable state law. No question of federal law is involved. The Court of Appeals has not departed from the accepted and usual course of judicial proceedings.

A decision by this Court, whether one of affirmance or of reversal, would have no greater effect than to determine the rights of the parties and would not bind the courts of Texas or, for that matter, the United States courts when applying Texas law.

II.

QUESTIONS PRESENTED

1. Whether a case involving no more than the application of a specific state of facts to the law of the State of Texas is of sufficient importance to cause this Court to invoke its judicial discretion and determine whether the

United States Court of Appeals has properly applied those facts to the state law?

2. Whether the United States Court of Appeals, in determining a suit brought under the law of the State of Texas, erred in applying the law as construed by the Supreme Court of Texas?

3. Whether the United States Court of Appeals correctly applied the law as construed by the Supreme Court of Texas in holding that, under the facts in evidence, the Petitioner failed to establish a cause of action.

III.

STATUTE INVOLVED

1. There is no federal statute involved in this case other than the *Rules of Decision Act, 28 U. S. C., Section 1652*, which provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

2. The only substantive statute involved is *Article 8306, Section 1, of the Revised Civil Statutes of Texas (1925)*, which provides:

> "Sec. 1. In an action to recover damages for personal injuries sustained by an employe in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

"1. That the employe was guilty of contributory negligence.

"2. That the injury was caused by the negligence of a fellow employe.

"3. That the employe had assumed the risk of the injury incident to his employment; but such employer may defend in such action on the ground that the injury was caused by the willful intention of the employe to bring about the injury, or was so caused while the employe was in a state of intoxication.

"4. In all such actions against an employer who is not a subscriber, as defined hereafter in this law, it shall be necessary to a recovery for the plaintiff to prove negligence of such employer or some agent or servant of such employer acting within the general scope of his employment."

IV.

STATEMENT

The statement contained in the petition for writ of certiorari is not complete and contains much irrelevant and immaterial matter. Thus, for example, the opening paragraph (Petition, pg. 3) is no more than an appeal to the sympathy of the Court and states no facts having any bearing on the questions presented.

Petitioner, at the time of his asserted injury an employee of Respondent, Sears, Roebuck & Company, was a driver of a local delivery truck on a rural route.

Each morning Petitioner and his helper, after reporting to work and picking up their truck, would load the mer-

chandise they were to deliver (Tr. 50).[1] Petitioner actually handled each item and knew both the size and weight of each. To a lesser extent this information was also known to Respondent's supervisors who had a load sheet (Plaintiff's Exhibit 1) showing generally, but not specifically, the size and weight of the items to be loaded on each truck (Tr. 30).

On the particular day in question, Petitioner was to deliver a 361-pound deep freeze unit (Tr. 42) to the home of a Mr. Stultz in Richardson, Texas. Pictures of the home appear as Plaintiff's Exhibits 5, 6, 8 and 9 (Tr. 62, 65, 68, 71).

Because there was another vehicle in the driveway and a low wire across it, Petitioner could not back his truck up to the garage where the freezer was to be placed (Tr. 63, 97-98). There is nothing in the evidence, however, to show that Respondent or its agents knew of that situation (Tr. 47).

The driveway was covered with loose gravel and, because the patio and lawn along side it were rough, Petitioner knew he could not use the dolly which Respondent had furnished to him (Tr. 66, 71). These unusual and unanticipated circumstances made it necessary to carry the freezer. The vehicle in the driveway made it necessary to cross both the patio and the lawn (Tr. 66).

Petitioner and his helper unloaded the freezer from the back of the truck. During this operation nothing happened to Petitioner (Tr. 102). They then proceeded to carry it

[1]References are to the transcript of Record filed in the Court of Appeals.

toward the house (Tr. 64). On the way the helper, who was carrying the light end, almost dropped it, throwing all the weight onto the Petitioner (Tr. 73). Either Mr. Stultz or both Mr. Stultz and his son then helped carry the freezer the remaining distance (Tr. 104).

Petitioner felt no pain until after the freezer had been set down in the garage, at which time he felt something like a bee sting (Tr. 73, 103-104). He alleged, and there was some evidence to support it, that he had injured his knee.

As one ground of negligence Petitioner alleged a failure to furnish him proper mechanical contrivances to assist in unloading the deep freeze and in carrying it (Tr. 3).

The evidence showed that each of Respondent's delivery trucks was supplied with a dolly (Tr. 32). The dolly used by most of the drivers was a two-wheel dolly, a picture of which appears in the transcript as Plaintiff's Exhibit 2 (Tr. 34). Petitioner, however, had volunteered to use a special type of dolly (Tr. 89) which had four wheels instead of two and which had arms that could be extended (Tr. 40, et seq.). The use of this dolly was experimental (Tr. 42, 48-49, 89).

Other dollies were available on the loading dock if a driver desired or needed one (Tr. 49, 52) and no driver had ever been refused the use of a dolly which he had requested (Tr. 56).

Petitioner testified that he didn't remember whether he had his dolly with him on the occasion in question (Tr. 88,

105), although he had been told to keep it on the truck (Tr. 88). As a matter of fact, when he arrived at the Stultz residence, Petitioner knew that he could not use his dolly because of the gravel driveway (Tr. 100) and his only choice was to carry the freezer (Tr. 66, 71). Therefore, he didn't even look to see if he had the dolly with him (Tr. 105).

There is no testimony in the record and no evidence of any sort that there was any kind of dolly, other than those made available to Petitioner, which would have made it possible for him to transport the freezer across the lawn, the patio and the gravel driveway. Nor is there any evidence that would indicate that a reasonably prudent employer, situated as was Respondent, would have provided any other type of dolly or equipment.

Petitioner also pleaded negligence in the failure to furnish him sufficient help to carry out his assigned duties (Tr. 3).

Although, in his deposition, Petitioner testified that he had never on any prior occasion called for additional help (Tr. 208), upon the trial of this case he said that on one prior occasion he had called and that help was refused because none was then available (Tr. 84-85, 87). However, even on that one occasion, he was not instructed to do the work without additional help (Tr. 87).

Petitioner testified that he had been instructed by Respondent to call for help when needed (Tr. 87, 106).

Whether or not help was required was left to the individual driver (Tr. 43). Respondent's supervisor did not remember if anyone on any of the rural routes, as distinguished from the city routes, had ever requested help (Tr. 45), but the drivers had been instructed to hire help for which they would be reimbursed (Tr. 51, 52). Although help was not often hired (Tr. 54), no one had ever been refused reimbursement (Tr. 55).

The supervisor further testified that occasionally Respondent would hire outside firms to deliver heavy items (Tr. 43) and that on still other occasions Respondent's own delivery men had brought back merchandise which they had been unable to deliver (Tr. 51). Respondent's witness, Emmett Sims, one of its drivers, corroborated this testimony, stating that he had been instructed to hire men on the spot (Tr. 197, 200) and that, when help was not available, he had brought items back (Tr. 198).

Both Petitioner and Mr. Sims testified that two men would be sufficient to load and unload a freezer of the type which Petitioner was handling when allegedly injured (Tr. 96, 197).

When he loaded the freezer involved in his alleged accident, Petitioner said nothing about needing help to unload it (Tr. 94, 96). He didn't even consider calling for help (Tr. 106) and stated:

> "* * * it looked to me like we could have done it." (Tr. 105.)

He had no mental reservations about being able to handle the freezer and thus there was no reason for him to look for additional help (Tr. 209).

Respondent moved for an instructed verdict (Tr. 18), asserting that there was no evidence of any negligence .This motion was overruled. After the jury verdict had been returned (Tr. 233), Respondent reasserted the same ground in its motion for judgment notwithstanding the verdict (Tr. 233), and, in its alternative motion for new trial (Tr. 235), asserted that the verdict of the jury was contrary to the overwhelming preponderance of the evidence and without sufficient evidence to support it. These motions were overruled (Tr. 239) and judgment entered for Petitioner (Tr. 241).

The Court of Appeals, after reviewing the Texas authorities cited by both Petitioner and Respondent, determined that, under the decisions of the Supreme Court of Texas, Respondent was entitled to an instructed verdict in the trial court.[2] The judgment in favor of Petitioner, therefore, was reversed and judgment rendered in favor of Respondent.[3]

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[2]There is one typographical error in the copy of the Court of Appeals' decision, Appendix A to the petition for writ of certiorari. The first sentence of the middle paragraph on page 44 should read:

> "Because, for the reasons hereafter briefly stated, we are in *no* doubt that appellant's primary ground of error is well taken, we will not undertake to discuss the other grounds."

[3]Other points of error asserted by Respondent in the Court of Appeals were not considered. These pertained to errors committed by the trial court during the trial and were material only if Petitioner's evidence presented a jury question.

V.

ARGUMENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

1. This Court should not invoke its discretionary jurisdiction because no special or important reason is shown for granting the writ, and a decision by this Court would have little effect on the state law involved.

As Chief Justice Taft has stated:

> "* * * The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes; first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing * * *." *Magnum Import Company v. De Spoturno Coty, 262 U. S. 159, 163, 67 L. ed. 923 (1923).*

This suit was brought to recover, under the workmen's compensation laws of the State of Texas, against a non-subscribing employer. Jurisdiction in the federal court existed because, and only because, there was diversity of citizenship and the requisite amount in controversy. No federal question was presented for decision.

The basis of the decision by the Court of Appeals was that, under the decisions of the Texas Supreme Court construing its workmen's compensation laws, the evidence of-

fered by Petitioner was insufficient to warrant submission of the case to the jury.

This Court has repeatedly held, and rightly so, that where the question is one of the sufficiency of evidence, certiorari should not be granted. *Houston Oil Company of Texas v. Goodrich, 245 U. S. 440, 62 L. ed. 385 (1918); Southern Power Company v. North Carolina Public Service Company, 263 U. S. 508, 68 L. ed. 413 (1924); General Talking Pictures Corporation v. Western Electric Company, 304 U. S. 175, 82 L. ed. 1273 (1938); National Labor Relations Board v. Pittsburgh Steamship Company, 340 U. S. 498, 95 L. ed. 479 (1951).*

The dockets of this Court are now overcrowded with cases involving questions of general applicability, questions involving the construction of the Constitution and statutes of the United States, questions which must eventually be decided by this Court so that, in the language of Chief Justice Taft, there may be "uniformity of decision between those courts in the nine circuits."

The instant case is a typical example of one in which the sole purpose to be served by granting the writ would be to give a party, defeated in the Court of Appeals, another hearing.

The Court of Appeals based its judgment on two decisions by the highest court of Texas.[4] Petitioner asserts that those decisions should not have been followed and that the

[4]*Great Atlantic & Pacific Tea Co. v. Evans, 142 Tex. 1; 175 S. W. 2d 249 (1943); Western Union Telegraph Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977 (1947).*

law applicable to the facts of this case is stated in a decision of a lower appellate court of the State of Texas.[5] It would be contrary to the past pronouncements of this Court were it to grant certiorari and attempt to determine whether the Supreme Court of Texas or the Court of Civil Appeals of Texas had correctly construed the state law. This Court has consistently relied upon the courts of appeals to determine such questions.

Thus, in *Huddleston v. Dwyer, 322 U. S. 232, 88 L. ed. 1246 (1944)* this Court said:

> "* * * The decisions of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts * * *. When we are called upon to decide them, the expression of the views of the judges of those courts, who are familiar with the intricacies and trends of local law and practice, if not indispensible, is at least a highly desirable and important aid to our determination of state law questions." (237.)

Any determination by this Court, whether affirming or reversing the judgment of the Court of Appeals, would have no more effect than to determine the specific rights of the parties. Such a determination would have no binding effect on the courts of the State of Texas and would have none on the federal courts, when applying the laws of Texas.

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[5] *Loud v. Sears, Roebuck and Co., 262 S. W. 2d 548 (Tex. Civ. App. 1953).*

As early as 1879 the Supreme Court of Texas in *Peck* v. *The City of San Antonio, 51 Tex. 490 (1879)*, referring to this Honorable Court, said:

> "Although we entertain the very greatest respect for the opinions of that high tribunal, yet we feel it our duty, upon a question which involves the proper construction of a local statute under the Constitution of Texas, to follow the latest decisions of this court; and particularly when, as in this case, the direct point involved has received our deliberate consideration upon a reexamination of the question." (493.)

That position has been reaffirmed by the Supreme Court of Texas [*Galveston H. & S. A. Ry. Co. v. Wells, 121 Tex. 310, 50 S. W. 2d 247 (1932); Texas & P. Ry. Co. v. Gillette, et al., 125 Tex. 563, 83 S. W. 2d 307 (1935)*] and has been recognized by this Court. Thus, in *Union Pacific Railroad Company v. Board of County Commissioners of Weld County, Colorado, 247 U. S. 282, 62 L. ed. 1110 (1918)*, a suit involving a state tax, this Court said:

> "The question is purely one of state law, and, so far as we are advised, the supreme court of the state has not passed on or considered it. A ruling by us on the question would neither settle it for that court nor be binding in an action to recover the tax if paid."

See, also, *Wichita Royalty Company v. City National Bank of Wichita Falls, 306 U. S. 102, 83 L. ed. 515 (1939); Alabama State Federation of Labor v. McAdory, 325 U. S. 450, 89 L. ed. 1725 (1945).*

Where, as here, the Court of Appeals follows the decisions of the highest court of the state whose law is applicable and, based upon those decisions, renders its judgment,

there is no question of sufficient importance for this Court to grant its writ of certiorari. The judges of the Court of Appeals, dealing with the particular law in question on frequent occasions, are in a far better position to determine the interpretation placed on that law by the courts of the state than is this Court.

Respondent therefore respectfully submits that there is no special or important reason sufficient to warrant the granting of this Court's writ of certiorari.

2. The Court of Appeals' decision follows and is in accordance with the applicable law of the State of Texas.

Petitioner alleges that the decision of the Court of Appeals conflicts with decisions of the Texas courts in two respects: (1) in applying the facts of the case to the law; and (2) in determining what proof was required to entitle Petitioner to have the evidence submitted to the jury.

The only case upon which Petitioner relies to establish an erroneous application of the facts to the law is *Loud v. Sears, Roebuck & Co., 262 S. W. 2d 548 (Tex. Civ. App. 1953, no writ history).*

Whether or not the decision of the Court of Appeals conflicts with the decision in the *Loud* case would appear to be immaterial.[6] The Court of Appeals, charged with determining the Texas law, relied on two Texas Supreme Court decisions: *Great Atlantic & Pacific Tea Co. v. Evans, 142*

[6]The facts and holding of the *Loud* case are discussed and compared with the facts of this case below, at page 22.

Tex. 1, 175 S. W. 2d 249 (1943) and *Western Union Telegraph Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977 (1947).* The *Loud* case, cited by Petitioner, is by a lower appellate court.

It is true that, under normal circumstances and in the absence of a decision by the highest court of the state, a federal court applying state law must be bound by decisions of intermediate state appellate courts. *Fidelity Union Trust Company v. Field, 311 U. S. 169, 85 L. ed. 109 (1940), rehearing denied 311 U. S. 730, 85 L. ed. 475 (1941) second motion for rehearing denied, 313 U. S. 550, 85 L. ed. 1515 (1941); Six Companies of California v. Joint Highway District No. 13 of the State of California, 311 U. S. 180, 85 L. ed. 114 (1940).* The rule, however, is qualified to the extent that a federal court may disregard an opinion of an intermediate state appellate court, where in the opinion of the federal court, there is persuasive data indicating that the highest court of the state would decide otherwise. *West v. American Telephone & Telegraph Company, 311 U. S. 223, 85 L. ed. 139 (1940).*

The *Loud* case is one in which no writ of error was sought in the Texas Supreme Court. It has neither the approval nor the disapproval of the Supreme Court of Texas. It was considered by the Court of Appeals and found inapplicable. The Court of Appeals had before it the two decisions by the Texas Supreme Court involving facts similar, if not identical, to the facts of the case at bar, as well as several other decisions of Texas courts of civil appeals applying the same construction to the state law. The

Court of Appeals clearly would have been derelict had it disregarded all that authority and chosen to follow the decision in the *Loud* case.

Petitioner asserts the decision of the Court of Appeals conflicts with other Texas decisions which involve the modicum of proof required *in the state courts of Texas* to overcome a motion for summary judgment or for an instructed verdict. Under this Court's decision in *Erie Railroad Company v. Tompkins, 304 U. S. 64, 82 L. ed. 1188 (1938)* a federal court, in a diversity case, must apply the state substantive law. *Procedural* matters, however, are still governed by federal law. Clearly, whether there is sufficient evidence to warrant submission of a case to a jury is not a matter of substance.

In *5 Moore's Federal Practice (2nd ed.), paragraph 38.10, page 102*, it is said, citing a number of cases:

> "The elements of plaintiff's prima facie case, or of defendant's defense, must be determined by applicable local law in a case involving only non-federal matters. But the sufficiency of certain evidence to raise a question of fact for the jury, or for the court where trial is without jury, should not be controlled by state law."

Reuter v. Eastern Air Lines, Inc., 226 F. 2d 443 (5th Cir. 1955) held that the scintilla rule, prevailinng in Alabama where the case was tried, was not applicable to the trial in the federal court.

Furthermore, whatever rule be applied, state or federal, Petitioner is urging here a rule established by decisions of the Texas courts of civil appeals, either without any action

by the Texas Supreme Court or with a writ of error refused with the notation "no reversible error."[7] The decisions upon which the Court of Appeals based its judgment, on the other hand, were the decisions of The Supreme Court of Texas. In both cases the Supreme Court held that the defendant employer was entitled to an instructed verdict. The Court of Appeals was bound to follow the Supreme Court decisions, despite any conflicting decisions of courts of civil appeals.

Whether the opinion of the Court of Appeals conflicts with any of the decisions of the Texas courts of civil appeals upon which Petitioner relies would seem to be unimportant. None of those intermediate court decisions has the approval of the Supreme Court of Texas and the Court of Appeals was not bound to follow them when it had be-

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[7] "Rule 483. Order on Application for Writ of Error

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused.' *In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation 'Refused. No Reversible Error.'* In all cases where the Supreme Court is without jurisdiction of the case as presented in the application it will dismiss the application with the docket notation, 'Dismissed for want of Jurisdiction.'

"In cases of conflict named in subdivision 2 of Art. 1728 of the Revised Civil Statutes of Texas, as amended, the Supreme Court shall grant the application for writ of error, unless it be in agreement with the decision of the Court of Civil Appeals in the case wherein the application is filed, in which event said Supreme Court shall so state in its order, with such explanatory remarks as may be deemed appropriate. In cases where the decision of the Court of Civil Appeals is in conflict with a previous opinion of the Supreme Court, the Supreme Court may, in its discretion, without the necessity of granting the writ and hearing the case, reverse the same on the application for writ of error, making, at the same time, such further orders as may be appropriate. As amended by order of Oct. 10, 1945, effective Feb. 1, 1946; and by order of July 20, 1954, effective Jan. 1, 1955."

fore it at least two pertinent decisions of the State's highest court.

3. The Court of Appeals properly applied the facts of the case to the law of the State of Texas as established by its statutes and its Supreme Court.

This suit was brought, in effect, under the Texas Workmen's Compensation Statutes (Article 8306 et seq., Revised Civil Statutes of Texas). Although, by Section 1 of Article 8306,[*] Respondent was deprived of the defenses of contributory negligence, negligence of a fellow employee and assumption of risk, that section required that Petitioner, to recover, prove negligence. In the absence of such proof an instructed verdict was proper. *Lightfoot v. Tindall, 282 S. W. 2d 901 (Tex. Civ. App. 1955, error ref'd, n. r. e.).* While assumption of risk is not a defense, such proof of negligence is not made merely by showing that the injury was referable to a risk inherent in the given employment. *West Lumber Co. v. Smith, 292 S. W. 1103 (Tex. Comm. App. 1927).*

The test of whether Respondent was negligent must be whether, by the exercise of ordinary care, it could have foreseen that some injury similar to that allegedly sustained by Petitioner would result from sending him to deliver the freezer in question with the equipment and assistance which he had. *Texas-New Mexico Ry. Co. v. Bailey, 203 F. 2d 647 (5th Cir. 1953).*

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[*]Quoted at page 3, supra.

Although Petitioner testified that his dolly, under the particular conditions existing at the Stultz residence, was not sufficient, the uncontroverted evidence showed that he himself selected that particular dolly. There is no evidence that any other type of equipment short of heavy moving equipment would have enabled him to transfer the freezer from his truck to the Stultz garage without carrying it. Of course, Respondent could have provided Petitioner with such equipment, but, unless Respondent is held to have been an insurer of Petitioner's safety, it was under a duty only to exercise reasonable care, based on what it could foresee, to furnish him sufficient equipment and assistance. By his own testimony, corroborated by the testimony of Mr. Sims and others, the equipment and assistance furnished to Petitioner were sufficient under normal and foreseeable circumstances.

Where the work which an employee is doing is his usual work and work which he has done before, as was true of Petitioner and the delivery of the freezer, the Texas courts uniformly hold that no negligence is proved.

In *Great Atlantic & Pacific Tea Co. v. Evans, 142 Tex. 1, 175 S. W. 2d 249 (1943)*, the plaintiff was injured while lifting and carrying 100-pound sacks of potatoes, work which he had done for several months without complaint. The alleged negligence was the failure of the defendant to furnish some assistance or to furnish a mechanical means of carrying the potatoes. Plaintiff's proof in that case was considerably stronger than was Petitioner's, for he had

asked the store manager to help him and for permission to borrow a truck from another store, neither of which was granted. Nevertheless, in reversing a judgment for the plaintiff and in rendering judgment for the defendant, the Texas Supreme Court said:

> "Negligence rests primarily upon two elements: (a) reason to anticipate injury, and (b) failure to perform the duty arising on account of that anticipation. * * *.
>
> "Although injury may result from a person's act or omission, yet, if the actor could not have reasonably foreseen the resultant injury, or injuries, similar in character, he is not to be held responsible therefor. * * *.
>
> "Measured by the above rules of law, we are convinced that the facts of this record fail, as a matter of law, to convict A. & P. of actionable negligence. Evans was a strong, robust young man. He was merely required to perform work that he had been doing for this same employer for several months before this occasion. He was doing the same character of work that other employees in other grocery stores constantly and generally did. He was doing the same character of work that he constantly and generally did in other grocery stores where he had been employed prior to his employment by A. & P. Certainly such a record cannot support a finding of actionable negligence. Evans cannot complain if A. & P. merely required him to do the usual and customary work required of persons in his line of employment, or, stated in another way, required by the character of the business in which he was employed. Finally, we think that the facts of this record fail, as a matter of law, to show that A. & P. ought to have foreseen that Evans would be injured by doing the character of work required of him in this instance." (251)

Western Union Telegraph Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977 (1947), involved injuries sustained while the plaintiff, an experienced carpenter, was taking down a partition wall. Holding that the employer had a nondelegable duty to exercise reasonable care to provide adequate help, the court further held, however, that where the movements of the servant depended upon his own volition, in no way affected by the control of a superior, there could be no recovery *unless it was further shown that the inadequacy of the assistance was known, either actually or constructively, by the master or his representative.* In reversing a judgment for the plaintiff the court said:

> "The employer is not liable when he has provided help and injury results from the act of the employee in voluntarily proceeding to do the work without assistance. The same is true when sufficient help is nearby and available and the employee does the work alone without seeking or asking for assistance. * * *." (979)
>
> "* * * There is nothing in the record to show that the employer or the employer's foreman knew or should have anticipated that respondent, immediately before the end of his day's work, would undertake alone a task that he could not safely perform without help, or that he would do so without seeking or asking for help. In our opinion there is no foundation in the evidence for a finding of negligence on the part of petitioner." (980)

To the same effect are *Hines v. Ross, 230 S. W. 1066 (Tex. Civ. App. 1921, error dism.); Melton v. Texas & N. O. R. Co., 254 S. W. 510 (Tex. Civ. App. 1923, error dism.); August v. Texas & N. O. R. Co., 265 S. W. 2d 148 (Tex. Civ. App. 1954, error ref'd, n. r.e.); Railway Ex-*

press Agency, Inc. v. Gray, 211 S. W. 2d 1013 (Tex. Civ. App. 1948, error ref'd, n. r. e.).

Petitioner asserts that the Court of Appeals, rather than following the foregoing authorities, should have followed *Loud v. Sears, Roebuck & Co., 262 S. W. 2d 548 (Tex. Civ. App. 1953).* That case was cited to the Court of Appeals by Petitioner and was distinguished by the Court of Appeals.

Clearly, a review of the facts of the *Loud* case will show that it does not establish any law contrary to the rule applied by the Court of Appeals and that it is easily distinguishable from the present case. Perhaps this may best be demonstrated by quoting that portion of the opinion where the court held the evidence sufficient to overcome the motion for summary judgment:

> "From the above quotation it will be observed that appellant testified that Arthur gave him specific instructions to be present at a definite time to do a specific thing: help move the motor. Appellant did not know how heavy the motor was, he had never before lifted or even seen one like it; there was no one else near except the other man whose status as a fellow employee, or a stranger, is not determined; Arthur, the building superintendent, did not show up at the appointed time, nor did he send anybody to help appellant, unless possibly it was the other man in the picture.
>
> "We think the failure of Arthur to be present at the appointed place and hour, or at least his failure to send some one or more persons to assist appellant, raises a fact question as to negligence. * * *." (552 to 553.)

The evidence in the *Loud* case also showed that the claimant was instructed to move the motor over his protest that it was too heavy for two men. In the case at bar, not only did Petitioner know the size and weight of the freezer which he was to move, but also he, and he alone, knew the peculiar circumstances which would make it unusually difficult to move the freezer from his truck. There is little similarity between this case and the *Loud* case and it obviously was not controlling upon the Court of Appeals.

Because the Petitioner failed to introduce any evidence that would show Respondent had an opportunity or a reason to foresee that either the equipment or the assistance available was insufficient, or that a reasonably prudent employer, situated as was Respondent, would have provided other or additional equipment or assistance, there was no proof of negligence. Under the Texas authorities, Respondent was entitled to either an instructed verdict or a judgment notwithstanding the verdict.

However, not only is there a lack of evidence of negligence but Petitioner's own testimony affirmatively showed that Respondent was not negligent. Foreseeability is an essential element of negligence. Petitioner's testimony was that he, with knowledge far superior to that of Respondent, was unable to foresee that injury would result. He knew that there was a gravel driveway; the Respondent did not. He knew that the driveway was blocked so that he could not back his truck up to the garage; the Respondent did not. He knew that the experimental dolly he had used would not work satisfactorily on the particular terrain in-

volved; the Respondent did not. With this superior knowledge he saw no reason why he and his helper could not carry the freezer into the garage.

> "* * * it looked to me like we could have done it." (Tr. 105.)
>
> "Question: 'Now, at the time you started to lift the freezer did you have any reservation in your mind about the two of you, you and your helper, being able to handle that job by yourself?'
>
> "Answer: No, sir, I didn't, because we have handled them all the time." (Tr. 209.)

Under similar circumstances, the Texas courts have held such testimony to establish, as a matter of law, the absence of negligence on the part of the employer.

In *Turnbow v. Panhandle & S. F. Ry. Co., 127 S. W. 2d 982 (Tex. Civ. App. 1939, error ref'd)*, negligence was claimed in ordering the plaintiff, an experienced section hand, to jerk a tie out from under a rail. The plaintiff testified that he had anticipated no trouble. The court said:

> "If there was no recognition of danger, or anticipation of injury, by the plaintiff, a veteran in the particular employment, then upon the same state of facts there could be no inference of any recognition of danger, or anticipation of injury, on the part of the foreman. * * *." (983) (Emphasis added.)

In *Shumake v. Great Atlantic & Pacific Tea Co. 255 S. W. 2d 949 (Tex. Civ. App. 1953, error ref'd, n. r. e.)*, the Court of Civil Appeals in affirming a judgment for the defendant notwithstanding the jury verdict, noted that the plaintiff, an experienced worker, did not ask for any help because she "didn't think about it being too heavy."

After citing the *Evans* and *Coker* cases, discussed above, the court said:

> "* * * under the evidence, it cannot be said that the employer, without further showing, should have foreseen injury (which could not be seen by Mrs. Shumake) in the lifting of the tray." (951-952)

To the same effect are *Hairston v. Oakwood Cemetery Ass'n, 94 S. W. 2d 493 (Tex. Civ. App. 1936, no writ history)* (affirming a judgment for the defendant notwithstanding the verdict); *Jackson v. Marshall, 243 S. W. 2d 205 (Tex. Civ. App. 1951, no writ history)* (affirming an instructed verdict for the defendant).

Petitioner asserts that the decision of the Court of Appeals conflicts in principle with *Sears, Roebuck & Company v. Robinson, 280 S. W. 2d 238 (1955)*. In that case the Supreme Court merely held that the rule, applicable in suits against owners of land, that the landowner was not responsible for conditions which were open and obvious, should not be extended to cases involving the relationship of master and servant. The court did not hold that the policy of the state no longer required an employee suing his employer to establish the employer's negligence. The decision in no way overruled, modified or limited the prior decisions in *Western Union v. Coker* and *Great Atlantic & Pacific Tea Company v. Evans.*

The Court of Appeals did not hold that Petitioner had assumed any risk or that he was guilty of contributory negligence. Its primary holdings, under the decisions of the

Supreme Court of Texas, were (1) that negligence must be based upon foreseeability and here there was no evidence that Respondent could have foreseen any difficulty; and (2) that an employer cannot be held liable for injuries resulting from work done with insufficient help where, in fact, help was available and could have been secured.

Not only was there no evidence that Respondent could foresee injury, but Petitioner himself could not foresee it. Thus an essential element of negligence was lacking. The uncontroverted evidence showed that Petitioner was not required to do the work alone and had been instructed to secure help when necessary. He was the only person who could determine whether, under the particular circumstances, other help was needed and his failure to secure it could not be attributable to Respondent.

CONCLUSION

Because this case involves no more than the application of certain facts to the established law of the State of Texas, it is of insufficient importance to call for this Court to take time from the decision of important constitutional and federal questions to pass upon the sufficiency of the evidence and the interpretation of the Texas statutes.

The Court of Appeals, which regularly deals with cases brought under the Texas workmen's compensation laws, has held that the law, as construed by the Supreme Court of Texas, denies Petitioner a right to recover.

For the foregoing reasons, the petition for writ of ceretiorari should be denied.

Respectfully submitted,

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Copies of the foregoing brief in opposition to the petition for writ of certiorari were on the ..... day of May, 1957, served on Cecil E. Woodgate and Thomas H. Hight, Attorneys for Petitioner.

.....

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JOHN T. FEY, Clerk

No. 889

In the

Supreme Court of the United States

OCTOBER TERM, 1956

KENNETH TALLEY,

Petitioner,

v.

SEARS, ROEBUCK & COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF TO THE BRIEF IN OPPOSITION

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PETITIONER'S REPLY BRIEF TO THE BRIEF IN OPPOSITION

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Kenneth Talley, respectfully files this his reply to Respondent's Brief in opposition in order to draw this Honorable Court's attention to various parts of Respondent's Brief which might well otherwise misdirect and mislead this Honorable Court in its consideration of the disposition of this case.

I

Respondent's statement of the evidence of record in this case is grossly misleading. That statement omits all mention of the testimony in Petitioner's favor to show that in fact no help was made available to Petitioner and to show that the instruction to call in for help was not bona fide and that no other bona fide provisions for help were made.[1]

At page 8 of its brief in opposition, Respondent states that: "*Both Petitioner and Mr. Sims testified that two men would be sufficient to load and unload a freezer of the type which Petitioner was handling when allegedly injured.*" (Emphasis theirs.) This statement is completely out of context as far as Petitioner's testimony is concerned. Other testimony of Petitioner shows that this part of his testimony does not mean what it appears to mean as stated by Respondent. For Petitioner added: "If they had proper equipment, yes." (R. 90-93. Also see R. 96.)[2]

Respondent omits all testimony as to past injuries.[3]

Other information in Respondent's statement is pointed out at various places, infra.

II

Petitioner has not, as Respondent at page 11 of its brief in opposition indicates, asked this Court to grant certiorari merely to review the sufficiency of evidence.

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[1]Cf. Petition for Certiorari, pages 9-15.

[2]Cf. Petition for Certiorari, pages 9 and 10. Also see, *id.*, page 22, note 2.

[3]Cf. Petition for Certiorari, page 15.

(1) Petitioner contends rather that the Court of Appeal below has erroneously held that the Texas cases of *Western Union Tel. Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977 (1947); Great Atlantic & Pacific Tea Co. v. Evans, 142 Tex. 1, 175 S. W. 2d 249 (1943)*, and *Jackson v. Marshall, 243 S. W. 2d 205 (Tex. Civ. App. 1951)*,[4] compelled it to reverse the judgment entered for Petitioner by the trial judge below on the jury verdict that Respondent's negligence was the proximate and foreseeable cause of Petitioner's injury and Petitioner contends that the error of the Court of Appeals is so clear and patent that this Court should exercise its supervisory jurisdiction over lower federal courts and grant certiorari.

In the *Great Atlantic & Pacific Tea Co. v. Evans* case, *supra*, there was *no* evidence of any *past* injuries from which a jury could infer that the employer could have reasonably anticipated that Evans would be injured unless assistance by way of other employees or safe equipment was furnished him for the task assigned. Not only was there absence of that kind of evidence but there *was* evidence that other employers, in the same kind of business, customarily furnished no additional help or mechanical devices to do the kind of job Evans was assigned and which caused his injury. In the case at bar there *is* ample evidence of a history of past injuries to Respondent's employees, brought about by lifting heavy merchandise (see Petition

[4]See the Petition for Certiorari, page 26, the second full paragraph. Respondent, at pages 25 and 26 of its brief in opposition, cites other Texas cases. Those cases add nothing and are similarly clearly distinguishable, but Respondent fails to mention the facts which clearly show this.

for Certiorari, page 15); there was *no* evidence that other employers in the same kind of business customarily furnished no more than two employees to lift heavy freezers or furnished no better mechanical devices for country deliveries.[5]

In the *Western Union Tel. Co. v. Coker* case, *supra*, sufficient additional help had *in fact* been furnished but was not used and there were *in fact* additional employees readily available to assist but their help was not requested. There was *no* evidence that the employer had any hint that the helper assigned would absent himself, or that the assistance of the other available employees would not be requested if such absence did occur, or that the work assigned would be attempted without assistance. In the case at bar the

[5]Respondent, at pages 7 and 19 of its brief in opposition, implies that in order to prove that an employer has negligently failed to furnish sufficient help or equipment for work assigned, that there must be an affirmative showing that other employers furnish more help or better equipment for doing similar work. The Court of Appeals below seemingly accepted Respondent's implication in this respect. See Appendix A, Petition for Certiorari, at page 43, second paragraph from the bottom of the footnote. No Texas cases are cited to support such implication. And counsel for Petitioner has been unable to find any Texas cases which suggest this. In fact the converse was held in *El Paso Electric Co. v. Gregston, 170 S. W. 2d 515 (Tex. Civ. App., 1942).*

There are Texas cases which did turn on an affirmative showing that other employers *did not* furnish more help or better equipment than was furnished for the performance of the work which resulted in the injury sued on. E. g., see *Great Atlantic & Pacific Tea Co. v. Evans, 142 Tex. 1, 175 S. W. 2d 249 (1943).* But, of course, such negative evidence is the kind of evidence which a defendant-employer would ordinarily bring out by way of defense, if available. E. g., see *Cameron Compress Co. v. Whitington, 280 S. W. 527 (Tex. Comm. App., 1926),* where it was held that such negative evidence is admissible. In cases which have turned on such negative, defensive evidence, the evidence tending to show negligence was of the weakest kind. E. g., see *Great Atlantic & Pacific Tea Co. v. Evans, Ibid.*

In the case at bar, the Respondent did *not* even offer evidence that other employers did not furnish more help or better equipment than was furnished Petitioner in performance of the task which caused his injury.

regular help assigned was used; there is ample evidence that additional help was necessary to safely lift heavy items like a deep freeze;[6] there is ample evidence that such additional help was *not* available[7] and there is ample evidence from which a jury could, as it did in this case, infer that Respondent could have reasonably anticipated that it would be necessary to carry the deep freeze by hand[8] and that no

[6]See Petition for Certiorari, pages 9-10 and 15. It should be noted that the Court of Appeals below completely ignored the evidence on this point. See Appendix A, Petition for Certiorari, page 43, the first and second paragraphs from the bottom of the court's footnote.

[7]See Petition for Certiorari, pages 10-12. It should be noted that the Court's statement of the case completely ignores all the evidence which shows as spurious the claim that help would have been provided had Petitioner asked for it. See Appendix A, Petition for Certiorari, page 42, note 1.

[8]Luther Hudler, Respondent's Supervisor of Retail Deliveries, testified: "Q. When you picked up a load sheet, and say somebody is going to make a delivery on Route 4, Dallas— A. Yes, sir. Q.—That is out in the country? A. Yes, sir. Q. No street? A. No, sir. Q. The houses far apart? A. Yes, sir. Q. Maybe a farmer righ t in the middle of a 500 acre pasture? A. Yes, sir." (R. 44.)

When the deep freeze was sent out, Respondent's supervisor knew that it was being sent to Route 4, Dallas—out in the country. (See Petition for Certiorari, page 5.)

From the testimony quoted above and from what everyone knows, the jury could reasonably conclude that Respondent could reasonably anticipate that (ordinarily) there would *not* be sidewalks or other hard and smooth runway surfaces at places of delivery in the country.

There is ample testimony that the dolly Petitioner was furnished would not be adequate for moving heavy items like a deep freeze unless it were used on smooth concrete or other smooth, hard surfaces. (R. 92, 93, 100, 105.)

Respondent, at pages 6 and 19 of its brief in opposition, makes much of the fact that Petitioner was given the choice of two types of dollies and that he voluntarily chose the one issued to him. But this does not mean, that putting Petitioner to such a choice, discharged the duty owed by Respondent to furnish adequate equipment. However, that question is not in issue as there is ample testimony that the other type dolly "of choice" was not fit for the type work required of Petitioner, as big items like a deep freeze would be too tall and would come up over the handles of the dolly, making it impossible for a worker to get a safe grip. (R. 90-92, 107.) Thus Petitioner's "choice" was between two types of inadequate dollies.

Respondent, at page 6 (last full paragraph) of its brief in opposition, states that: "Other dollies were available on the loading dock if drivers desired or needed one * * * and no driver had ever been refused the use of a dolly which he had requested." This statement may be mis-

(Footnote No. 8, Continued on Page 6)

additional help would be requested[9] and that delivery would be attempted without the additional help needed.[10] True enough, some of the evidence introduced to refute defenses was circumstantial. However, *Neigut v. McFadden, 257 S. W. 2d 864, 870 (Tex. Civ. App. 1953—writ of error refused, no reversible error), cited with approval in Loud v. Sears, Roebuck & Co., 262 S. W. 2d 548, 556 (Tex. Civ. App. 1953)*, held that such is a proper way to negative the existence of facts. In the case at bar the circumstantial evidence adduced is clearly sufficient to justify a jury decision that the assertion—that other help could have been obtained—was nothing more than subterfuge.[11]

In the *Jackson v. Marshall* case, *supra*, not only were there other employees *in fact* at hand and available to help if they had been asked, but in addition the employee who

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(Footnote No. 8, Continued from Page 5)

leading in that it seems to imply that another type dolly other than the two types Petitioner was required to choose between, was available to drivers. In fact the record clearly shows from testimony of Respondent's supervisor that the "other dollies," spoken of in the above quotation from Respondent's brief in opposition, were just more of the same type of inadequate dollies Petitioner was required to choose between. (R. 50, 51, 52, 56.)

Thus from the foregoing, a jury could reasonably conclude, as it did, that Respondent could reasonably have anticipated that Petitioner would have to carry the deep freeze by hand; and as Respondent's agents also knew that a deep freeze is bulky and heavy and that its weight is much greater on one end than the other, the jury could reasonably find that Respondent could have or should have anticipated Petitioner's injury. (See Petition for Certiorari, pages 4, 5 and 7.) The additional evidence produced of a history of past injuries strengthens the reasonableness of the jury's finding of foreseeability of injury to Petitioner. (See Petition for Certiorari, page 15.)

It is clear from the Texas court decisions that the particular events or circumstances need not be anticipated; all that is required is that some similar event or circumstances could have been anticipated through the exercise of ordinary care. E. g., see *Carey v. Pure Distributing Corp., 133 Tex. 31, 124 S. W. 2d 847, 849 (1939).*

[9]See Petition for Certiorari, page 11.

[10]See Petition for Certiorari, pages 14, 15.

[11]See Petition for Certiorari, pages 10-14.

was injured had control over the weight of the load to be lifted; there was no way the employer could have known how much weight the employee had undertaken to carry. In the case at bar the weight was a fixed quantity over which the Petitioner had no control and the employer knew that weight.[12]

From the foregoing, it can readily be seen that the three cases relied on by the Court of Appeals below (as *compelling* it to hold as it did) involved evidence or lack of evidence so crucially different from the evidence in the case at bar that even without more those cases are patently not controlling in the case at bar. And that the Texas Supreme Court did not comprehend that its holdings were to be read so broadly is clearly shown by the part of the *Western Union Tel. Co. v. Coker* case, *supra*, quoted (strangely enough) by Respondent at page 21 of its brief in opposition.

(2) And further, Petitioner is contending that the holding of the Court of Appeals below, that the three cases relied on (discussed above) are applicable and controlling in the case at bar, is in direct conflict with the holding of the Texas Court of Civil Appeals for Dallas in *Loud v. Sears, Roebuck & Co., 262 S. W. 2d 548 (Tex. Civ. App. 1953)*. The Texas court in that case, which involved operative facts on the issue of negligence and foreseeability

[12]See Petition for Certiorari, pages 4, 5 and 7.

which are weaker than those in the case at bar,[13] held that the three cases discussed above were not only not controlling but that they were not even applicable. The holding in the *Loud* case, *supra*, has never been disapproved by the Texas Supreme Court. This Court has held that in such a situation the federal courts are bound by the state intermediate appellate Court holding, in the absence of convincing evidence that the law of the state is otherwise. *Six Companies of California v. Joint Highway Dist. No. 13, 311 U. S. 180, 85 L. Ed. 114 (1940); West v. American Tel. & Tel. Co., 311 U. S. 223, 85 L. Ed. 139 (1940).* Other than relying on the very cases held by *Loud* to be inapplicable to a case like

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[13]In the *Loud* case, a statement by the employer's agent that help would be furnished was held to be sufficient evidence to allow a jury to infer that the need for help was known and to be sufficient to support a jury finding that there was a duty to furnish help. Also, in *Loud* it was held: that it was for the jury to decide whether or not the specific direction to do the work (which resulted in injury) superseded a general order to lift no more than could be lifted with safety.

In the case at bar there is the clearest kind of evidence to show (and a jury would most certainly be justified in finding as it did) that Respondent did not purpose to send the needed extra help out on rural routes and pay them for the entire day just to assist in making delivery of one item at an address on the route. See Petition for Certiorari, page 10-12. And the evidence clearly shows (and a jury would most certainly be justified in finding as it did) that Respondent could reasonably anticipate that *more* help than was ordinarily furnished for run-of-the-mill deliveries was needed when unusually large, heavy items like a 361 pound deep freeze were to be delivered out in the country. See Note 8, supra.

And the evidence clearly shows (and a jury would most certainly be justified in finding as it did) that the other alternatives asserted to be available to Petitioner were illusionary and nothing more than subterfuge. See Petition for Certiorari, pages 10-15. Also see Note 7, supra.

In fact the very illusionary nature of the alternatives, some of which employees are instructed about, makes this an even stronger case than *Loud*, as it more clearly shows guilty knowledge on the part of Respondent that additional help necessary for safety is many times not furnished (E. g., when heavy items are to be delivered in the country) when needed and that the equipment furnished will not make up for that deficiency. See Note 8, *supra*. Also see Petition for Certiorari, pages 11, 12, 15.

Respondent, however, at page 14 of its brief in opposition, argues that the *Loud* case is immaterial. But see pages 9-13, *supra*.

the case at bar, Respondent in its brief in opposition points to no evidence that the law of Texas is otherwise than as held by the Texas Court of Civil Appeals in *Loud, supra.*[14] Even if the cases held inapplicable in *Loud* are not patently inapplicable they are nevertheless not clearly applicable. And there is further evidence that the law of Texas is *not* otherwise than as held by *Loud.* See *Sears, Roebuck & Co. v. Robinson, 154 Tex. 336, 280 S. W. 2d 238 (1955).*[15]

III

Respondent asserts at page 16 of its brief in opposition that the Court of Appeals below is not bound by Texas Courts' of Civil Appeals decisions that the modicum of proof required in testing the grant of summary judgment is the same as the modicum of proof required in testing a

[14]No federal decisions are cited, however, to support such a novel argument, other than cases which did not involve the problem. The cases cited only speak generally of "convincing evidence" that the law of the state is otherwise than as held by an intermediate court of the state. That such "convincing evidence" must be gathered from sources not involved in the very intermediate court decision being considered is clearly indicated by what this Court said in *Six Companies of California v. Joint Highway Dist. No. 13, 311 U. S. 180, 85 L. Ed. 114 (1940),* and *West v. American Tel. & Tel. Co., 311 U. S. 223, 85 L. Ed. 139 (1940).*

Thus Respondent is only arguing that the *Loud* case is wrong and should not be followed by federal courts. But Respondent does not show by any means that the Supreme Court of Texas would not make the same distinctions made in the *Loud* case. To the contrary there is clear and "convincing evidence" that the Supreme Court of Texas will make the very distinctions made in *Loud* by the Texas Court of Civil Appeals for Dallas, if the question is ever raised in the Texas Supreme Court. E. g., see *Sears, Roebuck & Co. v. Robinson, 154 Tex. 336, 280 S. W. 2d 238 (1955),* discussed at page 14, infra.

Petitioner has not and does not argue, as Respondent asserts at page 12 of its brief in opposition, that any of the Texas decisions relied on by Respondent are wrong. This assertion is just a strawman. Petitioner contends only that Respondent and the Court of Appeals below rely on Texas cases which are quite beside the point and that to apply them to require that Petitioner be deprived of the jury verdict below is a gross misapplication of those cases and creates a rule of law to be applied by federal courts in the Fifth Circuit which is in direct conflict with applicable Texas state court decisions.

[15]See page 14, infra. See also Petition for Certiorari, page 34.

grant or denial of a motion for an instructed verdict. (See Petition for Certiorari, pages 28-31.) Respondent asserts that such question is a procedural matter and quotes at page 16 (of its brief in opposition) from *5 Moore's Federal Practice (2d Ed.) 102* for support. Whether or not the *Moore* quotation would be sustained by this Court, it clearly has nothing to do with any issue raised in or passed on by the Court of Appeals below.[16] The Court of Appeals below did not base its decision on any idea expressed by the *Moore* quotation; it held, that *as a matter of Texas law*, that there is no legal basis for a finding that Petitioner's injuries were proximately caused by any negligence on Respondent's part, and that Respondent's motion for an instructed verdict should have been granted. Three Texas cases were relied on as requiring that conclusion.[17] The patent inapplicability of those cases to the case at bar is shown at pages, 3-7, *supra*, and at pages 17-28 in the Petition for Certiorari. Not only are those cases patently inapplicable *per se*, but they were held by the Texas Court of Civil Appeals for Dallas[18] to be applicable in a case *(Loud v. Sears, Roebuck & Co., 262 S. W. 2d 548)* involving weaker inferences of negligence than the inferences which may reasonably be made in the case at bar.[19] The Court of Ap-

[16]Respondent's quotation from *Moore* is just another strawman, built up to be knocked down, and in the process to confuse the issue.

[17]*Western Union Tel. Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977 (1947); Great Atlantic & Pacific Tea Co. v. Evans, 142 Tex. 1, 175 S. W. 2d 249 (1943);* and *Jackson v. Marshall, 243 S. W. 2d 205 (Tex. Civ. App., 1951).* Also see Note 4, supra.

[18]Had this case not been removed by Respondent to the federal district court below, and had this case been tried instead in the state court where suit was filed, this is the Texas Court of Civil Appeals in which review would have been had.

[19]Cf. pages 3-7, supra, with Note 13, supra.

peals below considered the *Loud* case but refused to follow its necessary holding that the three Texas cases (relied on by the Court of Appeals as controlling)[20] have no application to a case like the case at bar. Thus the Court of Appeals has applied, as controlling, cases which *Loud* held not only *not* controlling but *not even* applicable. Unless *Loud* itself can be distinguished from the cases held inapplicable in *Loud*, then the Court of Appeals below in applying those cases to the case at bar, as not only applicable but controlling, has done so in square conflict with the *Loud* case.

Loud cannot be put to one side on the ground that it is "convincingly" wrong[21] and the Court of Appeals below makes no attempt on that ground to distinguish *Loud* from the cases held inapplicable by *Loud*. However, the Court of Appeals did give what appears to be three other reasons for distinguishing *Loud* from the cases held inapplicable in *Loud*. That two of these reasons (see Petition for Certiorari, page 27) are not valid is not denied by Respondent in its brief in opposition.

The third and last possible reason for distinction is clearly invalid also. The Court of Appeals said in its opinion: "The Loud case, 262 S. W. 2d 548, which appellee [Petitioner] cites as supporting his position, was an appeal from a summary judgment."[22] That and other language makes it appear that the Court of Appeals' refusal to follow the *Loud* holding, in respect to the cases distinguished in

[20]See page 3, supra.
[21]See pages 7 and 8 and Note 14, supra.
[22]See Appendix A of the Petition for Certiorari, pages 41, 49.

Loud, was based on the notion that, for some reason or other, a holding in a case involving review of the grant[23] of a motion for summary judgment (the *Loud* case) never has any binding application in a case involving review of the grant or denial of a motion for an instructed verdict (the cases held inapplicable by *Loud)*. Clearly such a notion cannot validly be based solely on the difference in the names of the motions. The only other conceivable basis for such a notion is that a different standard is used by the Texas courts for testing the sufficiency of the evidence in each type case; i.e., that the modicum of proof required to overturn on review the grant or denial of an instructed verdict for a defendant is greater than the modicum of proof required to reverse on review the grant of summary judgment for a defendant. Whatever may be the difference in standard applied by the federal courts in testing the sufficiency of the evidence in the very case being tried, it seems clear beyond argument that if the applicable substantive law is state law, then the federal courts may not, for the purpose of *determining the statute of that law*, distinguish *between* the state's court decisions on a ground that none of the state's courts have made and many have denied. That is the point made in the Petition for Certiorari beginning at page 28. All the Texas appellate courts which have passed on the point have held that there is no difference in the standard applied in testing a grant of summary judgment and a grant or denial of an instructed

[23]The reasons for not including "or denial" here in making the comparison is pointed out in the Petition for Certiorari at page 31.

verdict.[24] And one of the very appellate courts of Texas, which has held this, is the court which decided the *Loud* case.[25] Therefore, in determining the status of Texas law of negligence, the Court of Appeals cannot, without being in square conflict with other Texas court decisions, rely on a difference in modicum of proof as an excuse for refusing to follow the *Loud* holding in respect to the cases distinguished in *Loud*. That is the point Petitioner makes about modicum of proof in his petition for certiorari[26] and Respondent's quotation, from *Moore*, has no bearing on that point whatsoever. Thus the *Moore* quotation, at page 16 of Respondent's brief in opposition, serves no other purpose than as a strawman, built up to be knocked down, and in the process to confuse the issue.

There being no conceivable valid basis[27] for distinguishing *Loud* in making the determination of *the status of Texas substantive law of negligence*, the Court of Appeals below, in holding cases controlling which were held inapplicable in *Loud*, has decided a question of state law in a way that is in direct conflict with the *Loud* case.

IV

In the paragraph beginning on page 17 of Respondent's brief in opposition, Respondent mixes two issues as if only one is being spoken of and this is misleading. One of the

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[24]See Petition for Certiorari, page 29.

[25]*Mesquite v. Scyene, 295 S. W. 2d 276, 281 (Tex. Civ. App., 1956—writ of error refused, no reversible error).* See also, Note 18, supra.

[26]See Petition for Certiorari, pages 28-31.

[27]Respondent in its brief in opposition suggest no other possible reason.

issues is whether under Texas law, the test of a grant of a summary judgment is the same as the test applied to a motion for an instructed verdict. The Texas intermediate court decisions that Respondent speaks of, hold that the test is the same. There is no Texas Supreme Court decision involving this precise question. The Court of Appeals below is bound to follow the intermediate courts' decisions in this respect therefore.[28] Only after the foregoing has been concluded does the second issue of Respondent's statement come into the picture: Can the Texas Supreme Court decisions distinguished in *Loud* be used in a *Loud* type situation to relieve the federal courts of the duty of following *Loud*, absent any other indication to the contrary as to what the Texas law is in relation to the *Loud* type situation; and if so, are those cases persuasive that the Texas law is other than *Loud*[29]—especially in view of *Sears, Roebuck & Co. v. Robinson, 154 Tex. 336, 280 S. W. 2d 238 (1955)?*[30]

V

Respondent's argument beginning with the last paragraph on page 23 and ending on page 26 of its brief in opposition, flies in the teeth of the Texas Supreme Court decision in *Sears, Roebuck & Co. v. Robinson, supra.* In that case the employee knew of the danger, he knew the oil was

[28]See pages 9-13, supra. Also see *Six Companies of Calif. v. Joint Highway Dist. No. 13, 311 U. S. 180, 85 L. Ed. 114 (1940); West v. American Tel. & Tel. Co., 311 U. S. 223, 85 L. Ed. 139 (1940).*

[29]That would be a strange result indeed. Certainly the Court of Appeals below reached no such conclusion, as it distinguished the *Loud* case on other grounds and did not, therefore, have to consider the problem. See pages 9-13, supra.

[30]See Text immediately following. Also see, Petition for Certiorari, pages 34-37.

on the floor, but he nevertheless thought he could cross it without slipping. He started across, slipped and was injured. The Texas Supreme Court held that such was evidence of assumption of the risk, which is not a defense in an action against an employer who is eligible for but has failed to subscribe to workmen's compensation coverage; and that such knowledge or action on the part of the employee in no way relieved the employer of its duty to furnish a safe place to work.[31]

In Texas it is well settled that an employer has a duty to furnish his employees with safe instrumentalities and a safe place to work. It is also settled law in Texas that an employer has the duty to exercise reasonable care in providing his employees with adequate help in the performance of work required of them. Both duties are continuous and non-delegable.[32]

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[31]What the Petitioner thought he could do in the case at bar undoubtedly influenced the Court of Appeals below as can be seen from the prominence given, in its statement of the facts, the testimony about this. See the Petition for Certiorari, Appendix A at page 43, last paragraph of the Court's footnote 1. *But cf.*, Petition for Certiorari, page 22, note 2.

In addition, Respondent, in its brief in opposition, talks about the particular driveway involved and the unforeseeability of the particular circumstances there, as if Petitioner is contending that Respondent should have foreseen the particular events which precipitated the injury. See the Petition for Certiorari, page 36, last paragraph. That Respondent's similar stress in the Court of Appeals below had the undoubtedly desired diversionary effect is indicated by the words used by the Court of Appeals below to stress the particular circumstances which precipitated Petitioner's injury. See paragraph 5 of footnote 1 of the Court of Appeal's opinion, reprinted at page 42 of the Petition for Certiorari. All that is required under Texas court decisions, however, is that some similar event could have been foreseen through the exercise of ordinary care. E. g., see *Carey v. Pure Distributing Corp., 133 Tex. 31, 124 S. W. 2d 847, 849 (1939).*

[32]*Western Union Tel. Co. v. Coker, 146 Tex. 190, 204 S. W. 2d 977, 987 (1947); Morgan v. State, 170 S. W. 2d 648 (Tex. Civ. App., 1942), reversed on other grounds, 140 Tex. 620, 170 S. W. 2d 652 (1943).*

Viewing the Court of Appeals decision below for what it really does, the following seems apparent:

The non-delegable duty to furnish employees with adequate help and safe instrumentalities can now be delegated if it is delegated to the very employee to whom the duty is owed, and as a bonus for doing this the lack of the defense of assumption of the risk is no longer a disability as what would otherwise be a question of assumed risk is turned into a question of primary negligence, provided however that suit for injury is brought in or removed to a federal court in the Fifth Circuit.

It seems apparent that in the case at bar the Court of Appeals below not only usurped the function of the jury but, while purporting to follow Texas law, has cut through and refused to follow controlling Texas court decisions in order to reach a result which no doubt accords with its view of what the Texas law should be.[33]

VI

This case does not, as Respondent asserts, involve the rights of just Petitioner; the Court of Appeals below has decided right-out-of-the-window the protection afforded employees by Texas law in situations where their employers are eligible for but have refused to subscribe to a workmen's compensation plan. The decision below will affect the rights of the many thousands of employees who work in

[33]See *Gibson v. Phillips Petroleum Co., 1 L. Ed. 77 (1956) (No. 339, Oct. Term, 1956)*, where this Court reversed the Court of Appeals for the Fifth Circuit for acting similarly.

Texas for foreign corporations, as such employers can be trusted to set up a plan of defense by the same or similar methods of subterfuge adopted by Respondent in this case. And, when an injury occurs and suit is brought, those employers can be trusted to remove the case to a federal court in order to get the benefit of the decision of the Court of Appeals below and have the subterfuge upheld. The decision below has the effect of emasculating the Texas policy regarding workmen's compensation.[34] It is therefore important that this Honorable Court grant a writ of certiorari as prayed.

Respectfully submitted,

CECIL L. WOODGATE,
Fidelity Union Life Bldg.,
Dallas, Texas,

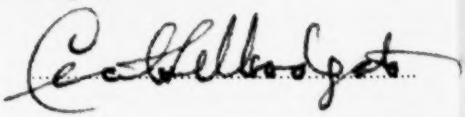
By .....
Counsel of Record for Petitioner.

and

THOMAS H. HIGHT,
Gulf States Building,
Dallas, Texas.

[34]Respondent, at page 12 of its brief in opposition, argues that no decision by this Court in this case will in any way bind the Texas courts. That statement is another strawman. Petitioner has made no such argument but to the contrary contends that the decision of the Court of Appeals should be reversed on the ground that it is at gross odds with applicable Texas court decisions in: *Loud v. Sears, Roebuck & Co., 262 S. W. 2d 548 (Tex. Civ. App., 1953); Neigut v. McFadden, 257 S. W. 2d 864 (Tex. Civ. App., 1953); Carey v. Pure Distributing Corp., 133 Tex. 31, 124 S. W. 2d 847, 849 (1939),* and *Sears, Roebuck & Co. v. Robinson, 154 Tex. 336, 280, S. W. 2d 238 (1955).*

A copy of the foregoing Reply Brief to the Respondent's Brief in opposition to the grant of a Writ of Certiorari in this case was on the 14th day of May, 1957, served on Mr. Pinkney Grissom and the firm of Thompson, Knight, Wright & Simmons, Republic National Bank Building, Dallas, Texas, Attorneys for Respondent.



JUN 13 1957
JOHN T. FEY, Clerk

No. 889

In the

Supreme Court of the United States

OCTOBER TERM, 1956

KENNETH TALLEY,
Petitioner,

v.

SEARS, ROEBUCK & COMPANY,
Respondent.

PETITION FOR REHEARING

CECIL L. WOODGATE,
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PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Kenneth Talley, respectfully presents this his petition for rehearing of the above entitled cause and prays that this Honorable Court review its order entered on May 21, 1957, denying petitioner's prayer that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above

entitled cause on December 14, 1956, and in support of his prayer for rehearing, petitioner respectfully shows:

The Court of Appeals below, in its statement of the facts of the case at bar and by its decision based on the facts as stated, has so clearly usurped the function of the jury and has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision over lower federal courts pursuant to Rule 19(1)(b) of this Court's Rules.

Open and frank distrust of juries is typically portrayed by Dickens in *Oliver Twist* where the beadle is reminded by the undertaker that the verdict of a jury suggested that more care on the part of the relieving officer might have altered circumstances that caused the death of a tradesman from want of the necessities of life.

> " 'Juries,' said Mr. Bumble, grasping his cane tightly, as was his wont when working into a passion: 'juries is ineddicated, vulgar, grovelling wretches.'
>
> " 'So they are,' said the undertaker.
>
> " 'They haven't no more philosophy nor political economy about 'em than that,' said the beadle, snapping his fingers contemptuously.
>
> " 'No more they have,' acquiesced the undertaker.
>
> " 'I despise 'em,' said the beadle, growing very red in the face.
>
> " 'So do I,' rejoined the undertaker."

The opinion of the Court of Appeals below equally demonstrates distrust of the jury verdict which suggests that

petitioner's 20% disability could have been prevented had respondent used more care in furnishing more help *or* better equipment to deliver a 361-pound deep freeze out in the country. For obvious constitutional reasons, however, the opinion below is not open and frank as were Mr. Bumble and the undertaker. To the contrary the court below shrouds from public scrutiny its bumbleistic approach by stating[1]: "Briefly but fully summarized, this is the evidence: * * *." The opinion then, instead of fairly stating the evidence, states only that evidence which would, in the absence of contradictory evidence, apparently justify reversal of the trial judge who entered judgment for petitioner in accordance with the jury verdict.

Not only does the opinion below not set out any of the evidence of record that is favorable to the necessary finding of the jury that two men were insufficient to make the delivery with the equipment furnished, but the opinion flatly states that "There was no evidence that two men were insufficient." That such a statement is clearly erroneous is a matter of record. See R.* 90-93, 96, 107, 193, 212-216.[2] The opinion below further states that "Indeed, both appellee [petitioner] and his assistant testified that two men would be sufficient to load and unload a freezer of the type appellee [petitioner] was handling when injured." But such testimony by petitioner was coupled with

[1]See note 1 of the opinion below, *239 F. 2d 82, 83.*

[2]See the petition for writ of certiorari, pages 9 and 10. R* refers to the record in the Court of Appeals below.

a crucial qualification which the opinion does not mention. In answer to a question as to whether two men are customarily sufficient to load and unload deep freezes, petitioner said, "If they had proper equipment, yes." (R. 90-93. Also see R. 96.) And petitioner testified that the equipment furnished was not adequate. (R. 107.) The person who was petitioner's helper on the date in question said nothing in his testimony which could reasonably be construed to mean what he is credited as testifying to. (See R. 166-170.)[3]

The statement in the opinion below of the evidence of record is a grossly unfair distortion of the record, forcing the result reached while making it appear that the result is not in conflict with applicable Texas court decisions. The Court of Appeals below has not decided at all the real case involved but rather has clearly decided a hypothetical case by picking and choosing evidence from the record and by even tortuous distortion of some of the evidence on which

[3]The opinion prominently sets out (in the statement of the evidence) petitioner's answer to a line of questioning that was repeatedly objected to as an attempt to prove assumption of the risk, a defense not available under Texas law. See *Sears, Roebuck & Co. v. Robinson, 154 Tex. 336, 280 S. W. 2d 238 (1955)*, where it was held that plaintiff's belief that he could safely cross over an oily floor was evidence bearing on assumption of risk, a defense not available to defendant. Equally prominently set out in the court's statement of the evidence is a similar answer petitioner made to a question asked him on deposition. Petitioner was asked: "Now, at the time you started to lift the freezer, did you have any reservations in your mind about the two of you, you and your helper, being able to handle that job by yourselves?" Petitioner answered: "No, sir, I didn't because we have handled them all the time." Reliance on this deposition testimony is not only subject to the *Robinson* case objection but it is also clear that, under Texas law, deposition testimony has no binding effect other than presenting questions of credibility for the jury where the deposition testimony is later modified or explained by the trial testimony. See *Smith v. Olsen, et al., 92 Tex. 181, 46 S. W. 631*. And see *Mitchell v. Swift and Company, 151 F. 2d 770*, an opinion by the court below.

the decision was based.[4] Such a patent usurpation of trial by jury and perversion of justice should without more cause this Court to exercise its supervisory power over lower federal courts pursuant to Rule 19(1)(b) of this Court's Rule.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Court of Appeals be upon further consideration reversed.

Respectfully submitted,

CECIL L. WOODGATE,
Fidelity Union Life Building,
Dallas, Texas,
Counsel of Record for Petitioner,

and

THOMAS H. HIGHT,
Gulf States Building,
Dallas, Texas,

By C. L. Woodgate

CERTIFICATE OF COUNSEL

I, counsel for the above-named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

C. L. Woodgate
Counsel for Petitioner

[4]Petitioner is not merely suggesting that the Court of Appeals' opinion leaves much to be desired but rather is contending that the opinion makes clear that the decision reached was based on no other evidence than that which is set out in the court's statement of the evidence. It is the unfairness of that statement which is challenged. Cf. *Gibson v. Phillips Petroleum Co., 1 L. Ed. 2d 77 (1956) (No. 339, Oct. Term, 1956).*

A copy of the foregoing petition for rehearing was on the 12th day of June, 1957, served on Mr. John W. Rutland, Jr., and the firm of Thompson, Knight, Wright & Simmons, Republic National Bank Building, Dallas, Texas, Attorneys for respondent.